

# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

## ***BASIC COURSE DESKBOOK***



### **Volume II**

## **General Administrative Law**

The Judge Advocate General's School  
United States Army

March 2002

JA 280

REPORT DOCUMENTATION PAGE			Form Approved OMB No. 0704-0188	
<small>Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.</small>				
1. AGENCY USE ONLY (Leave blank)	2. REPORT DATE 19 September 2002	3. REPORT TYPE AND DATES COVERED		
4. TITLE AND SUBTITLE JA 280, Basic Course Deskbook, Vols. I & II, March 2002, 1409 pages		5. FUNDING NUMBERS		
6. AUTHOR(S) TJGASA, Admin & Civil Law Dept 600 Massie Road Charlottesville, VA 22903		8. PERFORMING ORGANIZATION REPORT NUMBER JA 280		
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) TJGASA 600 Massie Road Charlottesville, VA 22903		10. SPONSORING / MONITORING AGENCY REPORT NUMBER Same as 8.		
9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES) Same as 7.		11. SUPPLEMENTARY NOTES Revised		
12a. DISTRIBUTION / AVAILABILITY STATEMENT A		12b. DISTRIBUTION CODE		
13. ABSTRACT (Maximum 200 words) Part I addresses the law of military installations. Part II covers military personnel law. Part III addresses those legal topics that affect civilian personnel law. Part IV contains the practical exercises and Part V provides resources to develop general lawyer skills..				
14. SUBJECT TERMS law of military installations, military and personnel law			15. NUMBER OF PAGES	
			16. PRICE CODE	
17. SECURITY CLASSIFICATION OF REPORT Unclassified	18. SECURITY CLASSIFICATION OF THIS PAGE Unclassified	19. SECURITY CLASSIFICATION OF ABSTRACT Unclassified	20. LIMITATION OF ABSTRACT	

**ADMINISTRATIVE AND CIVIL LAW DEPARTMENT  
BASIC COURSE DESKBOOK**

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## ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

### CLIENT SERVICES

The *Client Services Deskbook* contains Volume I of the instructional materials for the Administrative and Civil Law Department subjects. Volume II of the materials is in the *General Administrative Law Deskbook*. Both deskbooks contain Outlines of Instruction that include a table of contents, reference list, an outline of the law applicable to the subject being taught, and, in some cases, appendices that may include additional instructional material, extracts from Army regulations, and illustrative practical exercises.

These materials are general guides for taking notes during class and should serve later as your starting reference for research. The *Client Services Deskbook* is divided into three parts. Part I contains information on the Army's Legal Assistance Program and numerous areas of law that will help you provide personal legal advice to service members, civilians, and their families when you get to your assignments. Part II covers the military claims program and contains information you will need to advise both claimants and the command on what compensation the government will pay in case of a loss or damage caused during day-to-day military operations. Part III contains practical exercises, problems, and seminars intended to help illustrate the concepts taught during your core instruction.

### INTRODUCTION TO ARMY LEGAL ASSISTANCE

**THE CONCEPT.** Army Legal Assistance providers advise soldiers, family members, and other eligible clients on their legal affairs in a timely and professional manner by delivering preventive law information and resolving personal legal problems. Legal Assistance attorneys have provided professional advice to tens of thousands of clients on many matters, including family law, landlord/tenant, tax, wills and estates, powers of attorney, and notarial services since March 1943. Today, there are approximately 250 attorneys, 50 paralegals, and 250 administrative and clerical support personnel working full-time or part-time in over 85 Army Legal Assistance offices to help military personnel assigned all over the world. Legal Assistance providers helped over 117,000 clients during fiscal year 2001. Most of this assistance was in the areas of tax and estate law, family law, consumer law, and military administrative law.

**THE MISSION.** Army Regulation 27-3 states that the mission of the legal assistance program is to assist those eligible for legal assistance with their personal legal affairs in a timely and professional manner by meeting their needs for information on personal legal matters and by resolving their personal legal problems whenever possible.

The legal assistance program is a commander's program. Meeting the personal legal needs of every active duty service member, Reserve Component soldier, and emergency-essential DOD civilian employee helps ensure that they are ready for immediate mobilization and deployment at all times and enhances unit morale and discipline. Although legal assistance is a commander's program, legal assistance providers must remember that the commander and the Army are not the client. Legal Assistance attorneys serve the individual service member, family member, or civilian seeking their help.

## **INTRODUCTION TO MILITARY CLAIMS**

**THE CONCEPT.** Training missions and overseas deployments by active U.S. Army, Army Reserve, and National Guard personnel performing federal functions may result in claims filed by individuals to recover funds for maneuver damage, certain environmental damage claims, destruction of personal or real property, and physical injury or death. Additionally, soldiers of the Army and other armed services, as well as eligible Department of Defense (DOD) civilian employees who have deployed or changed permanent duty station, submit thousands of claims annually for lost or damaged household goods and other losses sustained incident to service. In sum, the foregoing claims, once evaluated, result in tens of millions of dollars paid each year by the Army Claims System. The U.S. Army Claims Service (USARCS), Office of The Judge Advocate General, has been delegated authority to supervise the processing of all of these claims on behalf of the Secretary of the Army and The Judge Advocate General. AR 27-20, Claims, para 1-8.

**THE MISSION.** The USARCS mission is to supervise, process, investigate, adjudicate, and negotiate the settlement of noncontractual claims worldwide against the Army. It pays claims for lost or damaged property, personal injury, death, medical malpractice, mission maneuver and environmental damage, disasters, and other costs arising from Army operations worldwide. JAGCNET, USARCS webpage, July 2000.

The Army Claims Service, through claims personnel in offices all over the world, processes three broad categories of claims:

- 1. Tort Claims** - Claims against the U.S. for personal injury, death, or property damage caused by the negligence of military personnel acting in the scope of employment or occurring incident to the noncombat operations of the armed services. Noncombat operations include peace-keeping and peace-enforcement missions; humanitarian relief operations in response to hurricanes, floods, earthquakes; and other natural disasters and civil disturbances. USARCS processes these claims under the Military Claims Act, the Federal Tort Claims Act, the National Guard Claims Act, the Foreign Claims Act, and a number of other claims statutes as appropriate.
- 2. Personnel Claims** - Claims against the U.S. filed by soldiers, DA civilians, and other military personnel for loss and damage of personal property occurring incident to service. These include claims for damage to household goods during a PCS move.
- 3. Affirmative Claims** - Claims on behalf of the U.S. against negligent third parties for damage to military property or injury to military personnel. USARCS, through affirmative claims, is responsible for recovering funds that are owed to the Army, DOD, and the General Treasury by transportation carriers, insurance companies and third parties who injure military personnel or damage military property.

With this brief overview of the Army's Legal Assistance and Claims Programs, welcome to the Client Services portion of your Basic Course Administrative and Civil Law instruction. This is where you, as a judge advocate, will be able to directly help eligible service members, civilian employees, and their family members the most.

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# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

## ***BASIC COURSE DESKBOOK***



### **Part I** **Legal Assistance**

The Judge Advocate General's School  
United States Army

MARCH 2002

JA 280

**CHAPTER A**

**ARMY LEGAL ASSISTANCE PROGRAM AND  
ADMINISTRATION**

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# **ARMY LEGAL ASSISTANCE PROGRAM AND ADMINISTRATION**

## **Outline of Instruction**

### **I. REFERENCES.**

- A. Army Reg. 27-3, Legal Services: The Army Legal Assistance Program (10 September 1995).
- B. Arquilla, Webster, Dupuy, "Army Legal Assistance: Update, Initiatives, and Future Challenges," The Army Lawyer, Dec. 1995, at 3.
- C. Legal Assistance Practice Notes, The Army Lawyer (monthly).
- D. JA 267, Uniformed Services Worldwide Legal Assistance and Reserve Components Office Directory.
- E. The Judge Advocate General's School (TJAGSA) Legal Assistance Branch Publications (available on JAGCNET).
- F. TJAGSA Videotape Bulletin (available on JAGCNET).
- G. 10 U.S.C. § 1044.
- H. 10 U.S.C. § 1054.
- I. 10 U.S.C. § 3013g.

### **II. INTRODUCTION.**

### **III. ARMY LEGAL ASSISTANCE PROGRAM (ALAP).**

- A. Army Regulation AR 27-3 (10 September 1995).

1. Prescribes policies, responsibilities, and procedures for the Army Legal Assistance Program. Implements:
    - a. 10 U.S.C. § 1044. Authority to provide legal assistance to active and retired service members and their dependents.
    - b. 10 U.S.C. § 3013g. Authority to provide legal assistance to other eligible clients.
  2. AR 27-3 does not create any right or benefit enforceable at law or equity, by a party against the United States, its agencies, its officers, or any other person. (para. 1-1a).
- B. Policy. (AR 27-3, para. 2-1).
1. Mission. The mission of ALAP is to assist those eligible for legal assistance with their personal legal affairs in a timely and professional manner by:
    - a. Meeting their needs for help and information on legal matters, and
    - b. Resolving their personal legal problems whenever possible.
  2. ALAP directly supports the military mission. Legal services must be continuous during both peace and war, and must provide more than just referral assistance.
    - a. Readiness.
    - b. Morale.
    - c. Discipline.
    - d. Quality Force.
- C. Responsibility.

1. Commanders are responsible for providing ALAP services on installations (resources permitting), to include office space, facilities, resources, and CLE funding for attorneys.
2. Staff Judge Advocates (SJAs), or other supervising attorneys, are responsible for operation of ALAP, to include determining scope of assistance provided. SJA must publish policy letter implementing AR 27-3.
3. The Chief, Legal Assistance Division, OTJAG, "is responsible for the overall supervision and administration of the legal assistance program," and for promulgating legal assistance policies and procedures.
  - a. Has limited authority to grant exceptions on a case-by-case basis to the provisions of AR 27-3 that governs who is authorized to provide and receive legal assistance.
  - b. May grant exceptions as to the nature of the legal assistance that may be provided.
  - c. Also is the "sole authority" for authorizing RC judge advocates to earn retirement points for legal assistance work performed when not on active duty.
  - d. Also serves as the "supervising attorney" for RC judge advocates not assigned to a TPU or the ARNG "when they are performing legal assistance work for retirement points."

#### **IV. PERSONS AUTHORIZED TO PROVIDE LEGAL ASSISTANCE (AR 27-3, PARA. 2-2).**

- A. Active Duty (AD) judge advocates.

\*Note: This means that all active duty judge advocates may provide legal assistance if not inconsistent with their assigned duties.

- B. Judge advocates on active duty regardless of component.

- C. Army National Guard (ARNG) judge advocates assigned to judge advocate positions, even while in civilian status when providing legal assistance pursuant to AR 27-3.
- D. US Army Reserve (USAR) judge advocates assigned to judge advocate positions in troop units (TPUs), even while in civilian status when providing legal assistance pursuant to AR 27-3.
- E. Other judge advocates authorized to provide legal assistance by the Chief, Army Legal Assistance Division.
- F. Department of Army (DA) civilian attorneys.
- G. Foreign licensed attorneys employed by DA who work under direction of supervising attorney while providing legal assistance on foreign law matters.
- H. Reserve Component (RC) attorneys while not in IDT, AT, or ADT status may earn retirement points for certain pre-approved legal assistance work. (See AR 27-3, para. 2-2b). See JA 267, Uniformed Services Worldwide Legal Assistance and Reserve Component Offices Directory.

**V. PERSONS ELIGIBLE TO RECEIVE LEGAL ASSISTANCE  
(AR 27-3, PARA. 2-5).**

- A. AC service members and their family members.
- B. RC service members who:
  - 1. Are serving on active duty pursuant to orders for more than 29 days (and their family members), or
  - 2. Are serving on active duty pursuant to orders for 29 days or less (and their family members). Supervising attorneys may limit legal assistance to emergencies or certain categories of cases based on resources.



3. Are undergoing Premobilization Legal Preparation (PLP).
- C. RC service members, other than those above, on military administrative matters, personal legal problems that may adversely affect readiness or that arose or were aggravated by military service - except for premobilization legal preparation (PLP), legal assistance will generally be limited to that provided by RC judge advocates to RC members.
  - D. AC and RC service members receiving retirement or disability pay (and their families).
  - E. Surviving family members of AC, RC, and retired service members who would have been eligible for legal assistance had they lived.
  - F. DOD civilian employees (includes DA employees).
    1. Against whom pecuniary liability recommended under AR 735-5 with regard to presenting matters in rebuttal to, or an appeal from, such charges, and/or
    2. Who are serving with the military in a foreign country (and their accompanying family members).
  - G. DA civilian employees.
    1. Who are employed overseas by U.S. government (services are limited).
    2. Who are stateside, classified as "mission essential" or "emergency-essential", and are being deployed (services are limited).
  - H. DOD contract employees overseas when contractually obligated to provide assistance.

- I. PNOK, executors, personal representatives, administrators, and estate representatives for matters relating to settling estates of:
  - 1. AC or RC soldiers who die in a military duty status.
  - 2. U.S. citizens and nationals employed by DOD and serving with or accompanying US forces outside U.S. at time of death.
- J. Fiduciaries of:
  - 1. AC or RC soldiers serving in combat zone.
  - 2. U.S. citizens and nationals employed by DOD and serving with or accompanying U.S. forces in combat zone.
- K. Members of other military forces while serving in U.S. (and their accompanying family members).
- L. Prisoners confined at U.S. military facilities, even though discharged.

**VI. DENIAL OF LEGAL ASSISTANCE SERVICES (AR 27-3, PARA. 2-6).**

- A. Except for active duty soldiers and RC soldiers on ADT for 30 days or longer, AC commanders may deny services to certain categories of clients listed in AR 27-3, para. 2-6, based upon the availability of space and facilities and the capabilities of the legal assistance staff. This includes sister-service personnel if their department does not routinely provide such services.
- B. Individual clients (for up to 1 year) due to abuse of legal assistance services, including:
  - 1. Missing two or more appointments without good cause or prior notification.

2. Misconduct, dishonesty, or other unbecoming conduct during course of seeking, receiving, or using legal assistance.
3. Knowingly using legal assistance services for a purpose prohibited by law or regulation.

## **VII. LEGAL ASSISTANCE SERVICES.**

- A. No distinction made between type of legal assistance rendered to individual office clients and that provided to soldiers preparing to deploy.
- B. Legal assistance services provided:
  1. During combat readiness exercises such as
    - a. emergency deployment readiness exercise (EDRE) or
    - b. an ARNG readiness for mobilization exercise (REMOBE) or
    - c. mobilization deployment readiness exercise (MODRE).
  2. During a RC Premobilization Legal Preparation (PLP).
  3. During soldier readiness program (SRP) processing.
  4. During a demobilization briefing.
  5. During a scheduled or unscheduled client interview.
  6. During an informal conversation, in response to a question or request for assistance.
  7. In preparing and filing tax returns.

8. By giving classes and briefings and by writing and publishing articles on preventive law subjects.

C. Types of cases given legal assistance (AR 27-3, para. 3-6).

Consistent with available resources and expertise, certain minimum legal services should be provided to each client seen.

1. Family Law.

- a. Cases which must be given assistance:

- (1) Marriage.
    - (2) Annulment.
    - (3) Paternity.
    - (4) Child custody.
    - (5) Financial nonsupport.
    - (6) Legal separation.
    - (7) Divorce.

- b. Cases which may be given assistance depending on available resources and expertise:

- (1) Adoption.
    - (2) Other family law cases.

2. Estates.

a. Cases which must be given assistance;

- (1) Wills.
- (2) In conjunction with will preparation, discuss SGLI designation and advise on effect of "by law" designation". [Army prohibits "by law" designation].
- (3) Attorney who prepares will shall insert his or her name on the will as the drafter and shall include state of bar membership.
- (4) An attorney must review the will prior to and after execution and must be present to supervise the execution of the will
- (5) May use statutory short form wills.
- (6) See AR 27-3, para. 3-6b for further guidance on will drafting, estate planning, and assisting next-of-kin.
- (7) Testamentary trusts for minors.
- (8) Guardianships.
- (9) Preparing health care directives, including:
  - (a) Living wills,
  - (b) Powers of attorney for health care, and
  - (c) Anatomical gift designations.

- b. Other aspects of estate planning may be given assistance depending on available resources and expertise.
- 3. Real Property.
  - a. Cases which must be given assistance: Landlord/tenant.
  - b. Cases which may be given assistance depending on available resources and expertise:
    - (1) Matters relating to purchase, sale, and rental of client's principal residence. (But see AR 27-3, para. 3-8a(2) - may not represent client in private business activities).
    - (2) Assistance may include drafting documents for above.
- 4. Personal Property.
  - a. Cases which must be given assistance: Purchases of personal property, to include contracts, mortgages, security agreements, warranties, cancellations, and other consumer affairs matters.
  - b. Cases which may be given assistance depending on available resources and expertise: Selling or leasing personal property (But see, AR 27-3, para. 3-8a.(2), on prohibition against helping clients on private business activities).

5. Economic.

a. Cases which must be given assistance:

- (1) Debtors in disputes over lending agreements.
- (2) Debtors requiring help on bankruptcy, debt, banking, credit card, property insurance problems, and claims.
- (3) SSCRA interest limitations.
- (4) Veterans' reemployment rights (But see cautionary note and limitations in AR 27-3, para. 3-6e(2).

b. Cases which may be given assistance depending on available resources and expertise: Creditors in disputes over lending agreements.

6. Civilian Administrative.

a. Cases which must be given assistance: Notarizations (AR 27-55).

b. Cases which may be given assistance depending on available resources and expertise:

- (1) Name changes.
- (2) Immigration.
- (3) Naturalization.
- (4) Welfare assistance.
- (5) Other cases.

7. Military Administrative.
  - a. Cases which must be given assistance:
    - (1) As required by law or regulation.
    - (2) Line of Duty (LOD) investigations, reports of survey, NCOERs, relief for cause reviews, memoranda of reprimand, Art. 138 complaints, Inspector General (IG) investigations, hardship discharges, compassionate reassignments, officer unqualified resignations, correction of military records.
  - b. Cases which may be given assistance depending on available resources and expertise: Bars to reenlistment, waivers to allow reenlistment, security clearance revocations, suspension of favorable personnel actions, expungement of military records, physical evaluation boards, flying evaluation boards, quality accreditation for doctors, qualitative management, driving privileges.
8. Torts.
  - a. Cases which must be given assistance: Those involving invocation of Soldier's and Sailor's Civil Relief Act protections.
  - b. Cases which may be given assistance depending on available resources and expertise: Assistance limited to counseling and assistance in retaining civilian counsel.
  - c. Be alert to cases where client faces civil lawsuit as result of actions taken within scope of his/her official duties. Refer to claims JA or Army Litigation Center. (See 27-3, para. 3-6h(2)).
9. Taxes.



- a. Cases which must be given assistance:
  - (1) Real and personal property tax issues
  - (2) Income tax return preparation. (See AR 27-3, para. 3-6i).
- b. Cases which may be given assistance depending on available resources and expertise:
  - (1) Electronic filing.
  - (2) Estate, inheritance, and gift taxes.
  - (3) Appealing tax rulings or findings.
  - (4) Non-business income producing activities

10. Civilian Criminal Matters.

- a. Assistance may be provided based on expertise and resources.
- b. In-court representation is prohibited, except for cases pending before U.S. Magistrate on a military installation.

\*Note: In-court representation before a United States magistrate should be the exception, rather than the norm, and supervising attorneys should carefully review requests for in-court representation on a case-by-case basis.

D. Types of Services Provided.

- 1. Ministerial (i.e. notary services, witnessing signatures).
- 2. Legal counseling.

3. Legal correspondence.
  - a. Should include: "I represent (named client)" or "I write on behalf of my client (name)..."
  - b. Do not state: "This office represents (named client)..."
  - c. Do not include disclaimer: "This letter represents my own opinion as a legal assistance attorney and not the position of the US Army."
4. Legal negotiations.
5. Legal document preparation.
6. Document filing.
  - a. Only supervising attorney may authorize pro se assistance (this does not mean in court representation).
  - b. Unless on active duty, USAR and ARNG also must have approval of Chief, Army Legal Assistance.
7. In-court representation (civil matters).
  - a. Only supervising attorney may authorize.
  - b. Unless on active duty, USAR and ARNG also must have approval of Chief, Army Legal Assistance.
  - c. Authorization may be made on case-by-case basis (i.e. to allow attorney additional experience; to advance certain command objectives (protect soldiers from unfair business practices)).
  - d. Prohibited representation.

- (1) Military justice proceedings (USATDS handles).
- (2) Civilian criminal proceedings (except if before U.S. Magistrate on installation).

e. Persons eligible for representation.

- (1) Active duty or reserve on active duty over 29 days (less than 29 days if emergency), and
- (2) For whom hiring civilian lawyer would entail substantial financial hardship to themselves or their family.
  - (a) Supervising attorneys will determine if a client satisfies the substantial hardship test on a case by case basis.
  - (b) The following guidance will be applied in making these determinations:
    - (i) Soldiers in pay grade E-4 and below qualify if have no other significant income (rank and/or income of spouse will be considered if spouse is named party and interests are not adverse to soldier).
    - (ii) Soldiers above pay grade E-4 must provide financial information supporting substantial financial hardship.

f. Representation may occur if:

- (1) There is state-approved program (written agreement with state bar or motion granted from appropriate court), and

- (2) Attorney has requisite bar membership.

8. Legal referrals.

- a. AR 27-3 directs that legal assistance attorneys consider the following before referring a client to a military attorney or to a civilian lawyer, or providing a client a list of civilian lawyers:

- (1) Their own workloads.
- (2) Their areas of expertise compared to the expertise of the attorney receiving the referral.
- (3) The goals or interests of the client.
- (4) The convenience to the client.
- (5) The cost to the client.

- b. AR 27-3 also indicates the following order of preference on making referrals to military attorneys and civilian lawyers:

- (1) An attorney in the same Army legal office.
- (2) An attorney in another Army legal office, such as a USATDS branch office.
- (3) An attorney in another Army or military legal office of the same or different component.
- (4) A civilian lawyer on a no-fee basis.
- (5) A civilian lawyer on a reduced-fee basis.

(6) A civilian attorney whose fees are reasonable in the locale in which assistance is required.

- c. First discuss with lawyer to whom case will be referred.
- d. Avoid appearance of favoritism.
- e. May provide list of attorneys; copies of JAGC Reserve Officer Legal Assistance Directory will not be given out to clients.

9. Mediation.

- a. Mediation services may be provided as part of a formal program authorized by the commander responsible for the legal assistance program.
- b. Attorneys providing mediation services must comply with the applicable ethical standards of AR 27-26, and may mediate any dispute involving one or more eligible legal assistance clients.

E. Limitations on Services (AR 27-3, para. 3-8).

- 1. The following are not considered or counted as legal assistance cases and no legal advice or assistance, other than referral to civilian lawyers or providing lists of lawyers, may be provided:
  - a. Military justice matters.
  - b. Private business activities.
  - c. Civil litigation against the United States (action has commenced).

2. The following are considered as legal assistance cases and attorney-client relationships may be formed, when appropriate, but legal assistance is limited, as specified, to certain legal advice and guidance, and to referral to civilian lawyers or providing lists of lawyers:
  - a. Claims or civil lawsuits against the United States. Legal assistance is limited to general guidance on administrative or legal procedures and filing requirements.
  - b. Contingent legal fee cases. Legal assistance is limited to general advice on these lawsuits, court procedures, filing requirements, and the potential merits of these cases.
  - c. Prepaid legal representation cases. Legal assistance is limited to general advice on these lawsuits, court procedures, filing requirements, the potential merits of these cases, and on the client's need to contact the insurance company or other organization that will pursue or defend a potential lawsuit.
  - d. Standards of conduct issues. Legal assistance may be provided on standard of conduct issues, but legal assistance attorneys will refer clients to the Ethics Counselor for the "agency position concerning post-employment, honoraria, procurement integrity, and similar standard of conduct issues." Clients will be informed that "there is no attorney-client privilege or confidentiality between them and their Ethics Counselor" regarding standards of conduct matters.

## **VIII. PROFESSIONAL CONDUCT.**

- A. Those providing legal assistance will not make statements or send correspondence purporting to be on behalf of U.S., the Army, or the command or legal office (AR 27-3, para. 4-6).
- B. Those seeking official interpretation or position of government are referred to person responsible for such matters (i.e. an official legal opinion on interpretation of Army regulation).

C. Ethical standards (AR 27-3, para. 4-7).

1. AR 27-26 - rules of professional conduct for those providing legal assistance in Army.
2. Refer to another attorney when client's needs exceed legal assistance attorney's competence or authority to render assistance.
3. Must properly terminate attorney-client relationship.
4. May not request or accept benefit or gratuity from any source as payment.
5. May not request or accept compensation or benefit for referring to lawyer in private practice matter in which the lawyer was involved in military legal assistance capacity.
6. (RC) May not refer client to self or own firm for same general matter client sought legal assistance except on no-fee basis, but may represent client on new matters for fee.

**IX. ATTORNEY-CLIENT CONFIDENTIALITY (AR 27-3, PARA. 4-8).**

- A. Communications between attorney and client are confidential (see AR 27-26).
- B. If client authorizes disclosure, get his/her written authorization to disclose.
- C. Same standards of confidentiality apply to office staff and supervising attorneys.
- D. Client files are confidential and must be safeguarded.

## **X. CONFLICTS OF INTEREST (AR 27-3, PARA. 4-9).**

- A. See AR 27-26, Rules of Professional Conduct, 1.7 through 1.10 regarding conflict of interest and imputed disqualification.
- B. Supervising attorneys must establish procedures to ensure that:
  - 1. All clients are screened to avoid inadvertent conflicts.
  - 2. Full explanations given to each client not assisted because of a conflict.
  - 3. Confidentiality of attorney-client communications is protected.
- C. Army policy discourages attorneys from same office from providing legal assistance services to both spouses in domestic dispute.
  - 1. Exceptions may be granted by supervising attorney with informed consent of both parties.
  - 2. Maintain confidentiality of both parties.
  - 3. Resolve conflicts before representation in estate planning cases involving both spouses and/or involve requests for legal assistance on behalf of third party (i.e. younger person accompanying elder person).

## **XI. LIABILITY (AR 27-3, PARA. 4-3).**

- A. Legal Assistance attorneys acting pursuant to AR 27-3 are performing an official function of the U.S. Army.



1. 10 U.S.C. § 1054 - exclusive remedy for injury or loss of property caused by negligent or wrongful act or omission of any attorney, paralegal, or other member of the Army legal office is a civil lawsuit against the U.S. under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b); 2671-2680).
  2. See 28 C.F.R. § 50.15 regarding representation by Dept. of Justice.
  3. If Attorney General of U.S. certifies the attorney or other person was acting within scope of office or employment, U.S. will be substituted as defendant.
- B. See AR 27-3, para. 4-3d,e concerning liability of unit tax advisors and volunteers.

## **XII. REPORTING REQUIREMENTS (AR 27-3, PARA. 5-2).**

- A. Fiscal Year Legal Assistance Report - 15 October.
- B. Income Tax Report - 1 June CONUS; 1 July OCONUS

## **XIII. CONCLUSION.**

## APPENDIX A

### CHECKLIST FOR NEW LEGAL ASSISTANCE ATTORNEYS

This checklist should assist the new legal assistance attorney in becoming familiar with legal assistance office procedures and services. By following this suggested sequence, your familiarization should be completed as quickly as possible.

1. Read All Pertinent Publications. Carefully read AR 27-3, Legal Assistance; AR 27-26, Rules of Professional Conduct for Lawyers; AR 25-50, Preparing Correspondence; and the LAAWS Legal Assistance Module Deskbook. Understanding the contents of these publications is crucial to the successful discharge of legal assistance duties.
2. Read the SOP. The standard operating procedure explains most basic information that the new LAA needs to know right away about the office (e.g., organization, hours, duties, and resources).
3. Read the Office Handbook. The new LAA should read the locally published handbook on local law or procedures to learn any peculiar local law.
4. Consult the LAO NCOIC and/or Civilian Paralegal. The NCOIC should brief the new LAA on enlisted personnel and responsibilities. The NCOIC also can provide samples of standard correspondence and forms used in the office. Those LAOs with civilian paralegals and attorneys generally have an excellent institutional memory and can quicken the new LAA's transition. Usually, civilians will have been in the office for several years and will be familiar with common issues and problems, as well as many practical solutions and permissible shortcuts.
5. Legal Assistance Office Reading Files. Obtain several weeks or months of recent LAO reading files that have had personal identifying information (e.g., name, social security number) redacted. By reviewing these files, LAAs can identify the matters frequently handled by the LAO and can become familiar with appropriate formats, phraseology, and the correspondence errors the office strives to avoid.
6. Observe Client Interviews. Any good training program capitalizes on the experience of others. Seasoned LAAs should encourage the new LAA to observe several client interviews. Following the interview, the experienced LAA should answer any questions the new LAA may have on the interview or the legal advice rendered. After several interviews, the new LAA should conduct client interviews and consultations in the presence of the more experienced LAA. Thereafter, the two LAAs should discuss the interview process for the benefit of the new LAA.

7. Question Colleagues. Remembering the limits of confidentiality, the new LAA should nevertheless question colleagues regarding any matter about which the new LAA has a question. Asking questions is one of the best ways to narrow research and focus on the needs of specific clients.

## APPENDIX B: LEGAL ASSISTANCE CASES AND SERVICES

CASE CATEGORY	REQUIRED SERVICES	OPTIONAL SERVICES	OUTSIDE THE SCOPE OF LEGAL ASSISTANCE
Family law	Marriage Adoption Legal Separation Annulment Divorce Financial nonsupport Paternity Child custody	Adoption	
Estates	Wills Testamentary Trusts for minors Guardianships Designations of Life Insurance Beneficiaries and SGLI Beneficiaries Living Wills Powers of Attorney Anatomical Gift designations	<u>Inter Vivos</u> Trusts	
Real property	Lease Issues and disputes on principal residence	Purchase and Sale of Principal Residences	Private business activities
Personal Property	All consumer affairs issues	Sale or leasing of client's property	
Economic	Bankruptcy Debtors on loans Banking Problems Credit Cards Insurance SSCRA USERRA	Creditors on Loans	Government and Civilian employment -Hiring -Adverse Personnel actions -Unemployment Benefits -Worker's Compensation
Civilian Administrative	Notarizations	Name Changes Immigration Naturalization Welfare assistance Civilian Driving Priv.	

<b>CASE CATEGORY</b>	<b>REQUIRED SERVICES</b>	<b>OPTIONAL SERVICES</b>	<b>OUTSIDE THE SCOPE OF LEGAL ASSISTANCE</b>
Military Administrative	Line of Duty Reports of Survey OER/NCOER Relief for Cause Memoranda of Reprimand Article 138 complaints IG and other investigations Hardship Discharges Compassionate reassignment Correction of Military Records	Bars to Reenlistment Waiver to allow reenlistment Security Clearance revocations on military personnel Suspension or favorable personnel actions Expungement of military records Physical Evaluation Boards Flying Qualification Boards Quality accreditation for doctors Medical Evaluation Boards Qualitative Management Program Military Driving Privileges	USATDS Cases Officer eliminations Enlisted separations Reductions in grade Recruiter misconduct
Torts	Invoking SSCRA Protection		Contingent fee cases Litigation vs. the US
Taxes	Real Estate Personal Property Federal Income State Income	Electronic Filing of income tax returns Inheritance taxes Estate Taxes Gift Taxes Appealing tax rulings	Private Business Activities
Civilian Criminal Matters	Not required	In-court representation before US Mag. court	All other in-court representation
Ministerial Services	Witnessing Signatures Notarizations		
Legal Counseling	Whenever Necessary in required cases		
Legal Correspondence	Whenever Necessary in required Cases		

<b>CASE CATEGORY</b>	<b>REQUIRED SERVICES</b>	<b>OPTIONAL SERVICES</b>	<b>OUTSIDE THE SCOPE OF LEGAL ASSISTANCE</b>
Legal Negotiation	Whenever Necessary in required Cases		
Legal document preparation	Whenever Necessary in required Cases	Prenuptial agreements Separation agreements Inter Vivos Trusts	
Legal Document Filing	No requirements	Electronic Filing of income tax returns Pro Se Assistance	Pro se Assistance not authorized by supervising attorney
In-court representation	No requirements		In-court representation not authorized by supervising attorney
Legal Referral	Whenever necessary or appropriate in required or optional cases		
Providing List of Lawyers	As a secondary alternative to referral whenever necessary or appropriate in required or optional cases		
Mediation	No requirements		Mediation not authorized by a supervising attorney



**CHAPTER B**  
**CLIENT INTERVIEWING AND COUNSELING**  
**AND**  
**LAW OFFICE MANAGEMENT**  
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## **OUTLINE OF INSTRUCTION**

### **I. REFERENCES.**

- A. Army Regulation 27-3, The Army Legal Assistance Program (10 September 1995).
- B. AR 27-26, Rules of Professional Conduct For Lawyers (1 May 1992).[hereinafter Army Rules].
- C. TJAGSA Publication, JA 271, Legal Assistance Office Administration Guide (May 1997).
- D. DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977).

### **II. INTRODUCTION.**

- A. Interviewing... refers to lawyer interaction with a client for the purpose of identifying the client's problem and ...gathering information on which a solution to that problem can be based....
- B. Counseling... refers to a process in which lawyers help clients reach decisions....a process in which potential solutions with their probable positive and negative consequences are identified and then weighed in order to decide which alternative is most appropriate. Binder and Price, Legal Interviewing and Counseling: A Client-Centered Approach, West Publ. Co. (1977) at 5.

### **III. THE INITIATION (OR PREPARATORY ) STAGE.**

- A. Put the client at ease.
  - 1. Greet the client.
  - 2. Escort the client to your office.

- B. Office appearance:
  - 1. Desk appearance.
  - 2. Personal Appearance.
  - 3. Office Appearance.
- C. Initiate conversation.
  - 1. Role of Legal Assistance Attorney.
  - 2. Briefly discussing attorney-client confidentiality will put them at ease.
    - a. Our Rules of Professional Conduct provide that when representing a legal assistance client, you represent that client not the Army. Army Rule 1.13(b).
    - b. What they tell you is confidential and should not be told to others unless it fits within the Rules exceptions or you have the client's permission. Army Rule 1.6.
    - c. You may want to get the client's permission to discuss a difficult case with your boss and/or fellow attorneys. Army Rule 1.6 grants you implied authority to release confidences required to further the representation. It may be advisable, however, to consult with the client and ask permission to discuss the case with other attorneys.
  - 3. If at all possible exclude third parties from the interview. Make it possible!
  - 4. Avoid interruptions.
    - a. Phone policy.
    - b. Visitor policy.

- D. Time Management during interview.
  - 1. Inform client of time constraint up front?
  - 2. Focus the interview.
  
- E. At the beginning of the interview, determine whether client has seen another attorney and if so, whether the client or a potential adversary (or opposing party) is already represented.
  - 1. Get the other attorney's view.
  - 2. Also, hearing what the other lawyer advised can help you focus rapidly on the issues or spot ones not addressed.
  - 3. Ensure there is no conflict.
  
- F. Agenda?
  - 1. Gathering facts.
  - 2. Time for case development.
  - 3. Inform client of agenda?
  - 4. Explain interview process?
  
- G. Identify the reason for the client's visit.
  - 1. Determine the problem. "How may I help you today?"
  - 2. What is the nature of relief sought?

- a. Make sure you understand not only the problem but also what resolution the client seeks. Just because client X comes in with a marital problem, does not mean he or she wants a divorce. There may be underlying problems that can be cured through other means such as financial counseling.
- b. A Missouri Bar study indicated that there was only a 20% correlation between what a client wanted and what the attorney *thought* the problem was.

#### **IV. DEVELOPMENT STAGE OF THE INTERVIEWING PROCESS.**

- A. Goal: To learn as much as we can about the facts of the case and the client's objectives in the limited time available.
- B. Inhibitors:
  - 1. Ego threats. People withhold information that is threatening to their self-esteem; for example, a Colonel is taken by a Florida land swindle and he is ashamed to admit all the facts (particularly to you - a junior officer).
  - 2. Case threats. Clients will withhold information they feel may damage the case; for example, client husband thinks his drinking or abuse of the children will hurt his chances for custody , so he "neglects" to mention these facts.
  - 3. Role expectations. Clients come into an interview with certain preconceived notions of what is proper client behavior. In the military, clients often expect to be in the subordinate or passive position and they see the lawyer as occupying the superior role. In such situations the client may be reluctant to openly communicate. The military rank structure may make this worse because of rank role perceptions, expectations and sometimes outright hostility.
  - 4. Etiquette barriers. Some people will provide certain information only to certain people and not to others. For example, a man may feel comfortable only discussing problems with a woman and not another man who might threaten his self-image.

5. Trauma. Clients may be reluctant to relate unpleasant experiences. A wife might not relate spouse abuse.
6. Perceived irrelevancy. A client may think that a fact is not significant to the case, when in fact it is.
7. Greater need. A client may have different priorities of needs than the attorney perceives. For instance, a client may want to find another apartment after eviction, whereas the attorney is primarily concerned about a habitability defense for the client.

C. Facilitators:

1. Empathetic understanding. Try to listen, understand, and avoid judging the client. Try to see the case from the client's perspective.
2. Fulfilling expectations. On sensing reluctance from the client, the attorney can convey a strong expectation that the sought after information should be revealed. For example, the client is reluctant to talk about the unhappy marriage, the attorney acknowledges how difficult it is to talk about, but lets the client know that the information is important and that the attorney expects to hear the relevant information.
3. Altruistic appeals. Humans generally respond to higher values, above their own self-interest. This can be effective in persuading a spouse to reveal the other spouse's child abuse so the child can get help.
4. Extrinsic rewards. Show the client that providing the information will be in his or her best interest - it will help the case.
5. Recognition. You may have to resort to praising the client for giving the information by telling him or her how helpful they are being.

D. Techniques for Developing Facts.

1. Avoid early conclusions.
  - a. Let the facts come out first.

- b. Adopt an empathic approach.
- 2. Use questions effectively.
  - a. Open ended questions.
    - (1) "How did you feel after the collision?"
    - (2) "Tell me what happened."
  - b. Closed ended questions - questions that actually suggest an answer. Be careful, however - remember that the client establishes the goals of the representation. Examples:
    - (1) "You feel terrible about this, don't you?"
    - (2) "You would be better off with a divorce, wouldn't you?"
  - c. Combinations of the two are often used in interviewing and some call this the funnel approach. You use open-ended to get a general picture of the problem, then closed questions to focus.
  - d. Avoid confusing your client by asking double questions. Keep it simple.
- 3. Also avoid bombarding the client, let the client talk without having to respond to you all the time.
- 4. Try not to ask the "Why" question.
- 5. Use responses to show client you are actively listening.
  - a. Restatement - This shows the client you listened and understood what he or she said. Just rephrase what they said.

- b. Reflection - This shows the client you are empathetic and relate to his or her feelings about the case.
  - c. Explanation - This is a descriptive statement used to orient a client in a particular way. "I need to understand this about the case because..."
  - d. Encouragement - This is merely supporting and strengthening the client feelings toward the case.
  - e. Assurance and reassurance - This is used to indicate that we believe the client can face up to his or her situation.
  - f. Suggestion - This is a mild form of advice, but leaves leeway for the client to make the decision.
- E. Other techniques.
- 1. Wait out silences. Learn when to keep quiet.
  - 2. Don't be afraid to probe deeper if gaps or inconsistencies develop.
    - a. Probing is a necessary part of your job.
    - b. If the client becomes upset, reeducate him or her about your role and the confidentiality of the interview.
  - 3. Spot tension and emotional issues and develop. Try to help the client through these.
- F. Be sure to ask client if there is anything else you should know ... if anything important has been left out.
- 1. This puts the responsibility back on the client for the extent of your knowledge of the case.



2. If you don't ask it, he or she can later claim they didn't provide this information because you didn't ask.
- G. Problem areas during the development stage.
1. The rambling client.
  2. The deceptive client.
    - a. Be careful in domestic situations especially. Seldom will one party give the whole story and often it is shaded in their favor.
    - b. Tell the client if you find out inconsistent information, this often prompts them to be more truthful.
- H. Taking notes. If you take notes during the interview, wait to do it after the client talks a while and you explain to him or her that it is important for you to jot down some facts. Extensive note taking can be very distracting to a client and inhibit their conversation with you. You can always take more notes after they leave the office.

Be sure to make notes of their name, phone number and address, and military unit; this should be on the client cards that your receptionist prepares; if it is, check it for accuracy.

## **V. THE COLLABORATION AND COUNSELING STAGE.**

- A. Solving the problem.
1. Apply the facts to the law (or the law to the facts).
    - a. Consider the full range of alternatives and analyze probable outcomes.

- b. You must also consider (and **may** advise on) the impact of non-legal factors. Army Rule 2.1: provides that ". . . in rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors that may be relevant . . .".
    - (1) Telling a client he or she can sue for child custody without talking about the high costs involved in the suit would do an injustice to your client;
    - (2) Likewise if you believe after hearing all of the facts, that the children would be better off with the other spouse, you should advise the client how a judge or jury would look at those same facts. You should be familiar with how judges are treating certain types of cases within your jurisdiction.
  - c. Consultation.
- B. Teach the client about compromise.
- 1. Not always should a case go to court or even resolve solely in favor of one party.
  - 2. Many problems can be solved with common sense and compromise.
  - 3. Don't rush into a battle when there doesn't need to be one. One of the lawyers greatest tools is the ability to negotiate for clients.
- C. You need to completely and competently advise the client of the law and the risks. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. (Rule of Professional Conduct For Lawyers, Rule 1.4)
- D. Know your capabilities and limitations. Remember Army Rule 1.1 - Competence.
- E. Don't ever - ever - ever **guess** at the law.

- F. Be honest with the client. If they have a loser of a case, tell them. Conversely, don't make promises that they will win. In some ways it is just like a doctor. If the patient is terminal, is the physician being honest by telling the patient that "it's not too bad." When a physician must tell a family that a patient has died, he or she cannot say that the patient is in a very serious but stable condition! Packaging the negative information is necessary, deception, however, is unacceptable and unethical!
- G. Allow the client to make the final determination. (Army Rule 1.2)
- H. Be aware that some clients make very poor decisions in certain circumstances. For example, a mother may not ask for child support thinking she can manage all by herself. You need to advise her that the children are entitled to support by both parents.
- I. Problems in Counseling.
  - 1. Negative attitude towards attorney.
  - 2. Legalese.
  - 3. Negative reaction to advice. ("Shooting the messenger").
    - a. You can only do so much for a client. Just be sure to keep very good records of what you discussed and the advice you offered.
    - b. Some clients are happy to blame you after the fact.

## **VI. THE TERMINATION STAGE.**

- A. How do you end an interview? By all means, end the interview session on time. Don't forget that if you run overtime, you are into the client's time and your next client's time. If you must run over - get this client's consent and have someone let the next client know there will be a delay.

- B. Perhaps the most important thing is to ask client if they have any questions before you let them leave the office.
  - 1. “Do you have any questions?”
  - 2. **“Is there anything else I can do for you today?”**
- C. Make sure the client understands the nature of problem. Restate what you think the problem is i.e. "Client X, I think you have a financial problem, that if solved, could take the stress off of your marriage.
- D. Ensure client understands what will be done about the problem. For example:
  - 1. Tell the client that you will write a letter to the creditor outlining your agreed upon position;
  - 2. That you will call her spouse's divorce lawyer and see if a settlement can be reached on property division without going to court.
- E. Also, tell the client what you expect him or her to do. For example:
  - 1. Get more paperwork and bring it back the next day or
  - 2. Go to financial counseling services on base and work up a budget for the family.
  - 3. Some clients you talk to will not need legal services or need greater expertise than you have. Refer them to appropriate agencies or other attorneys.
- F. Give the client a timetable for achieving results. For example: "Let me know by next week if you hear from the car dealer." Then, call the client, if they don't call you.
  - 1. Keep the client informed and conduct all necessary follow-up actions. (Rule of Professional Conduct For Lawyers, Rule 1.4)

2. Show client to the door.
3. Terminating the relationship.

## **VII. HOW WELL DID YOU DO YOUR JOB? ASK THE CLIENT.**

- A. "Quality service is not limited to good work...[it includes] responsiveness, timeliness, accessibility, and even prompt return of telephone calls...." Schmidt The Client Service Edge - The Key to Your Firm's Future, 16 No. 3 Law Prac. Mgmt 18 (April 1990) (American Bar Journal).
- B. Client surveys can provide the legal assistance office with valuable feedback on the quality of services provided. (The following was taken from Coburn and Ginsburg, How to Design An Effective Client Survey, Vol. 13, No. 41 Nat'l. L. J. 26 (June 17, 1991):
  1. Good surveys lose their value if worded ambiguously or arranged in a confusing manner.
  2. Good surveys positively reflect on the office; poor ones do the opposite. Make the survey professional looking.
  3. Surveys should be geared toward the needs and interests of the office.
  4. Anonymous survey results provoke more candid responses.
- C. Both open-ended and closed-ended questions are valuable. A good approach is to use combination of both. Closed-ended questions are easy, quick for clients to complete, and objective. Open-ended questions complement the objectivity of the closed-ended question and allow the client to elaborate on his or her answers.
  1. A good approach is to focus the survey around close-ended questions and include a limited number of open-ended questions to allow the client to explain those questions calling for elaboration.

2. An example of combining these types of questions would be to ask "To what extent were you satisfied with the service you received at this office?" and provide five possible choices, ranging from "completely satisfied" to "very dissatisfied." Follow this question with a space for the client's comments or a follow-on question such as "What would you change about our office?"
- D. **Don't ask the question if you don't want to hear the answer.** It is pointless to conduct surveys if nothing will be done with the results.
1. Involving the legal assistance staff in analyzing the results is useful and encourages total commitment to the goal of improving services.
  2. Extend the "useful" suggestions you receive into an action plan that contains concrete proposals and assignments of responsibility.
  3. "Get mad, then get over it" (particularly if they unload on you).
- E. People evaluate five dimensions when judging the quality of a service (in order of importance) (the following was taken from Schmidt, The Client Service Edge - The Key to Your Firm's Future):
1. Reliability (the ability to provide what was promised, dependably and accurately);
  2. Responsiveness (the willingness to help customers and provide prompt service);
  3. Assurance (the knowledge and courtesy of employees, and their ability to convey trust and confidence);
  4. Empathy (the degree of caring and individual attention provided to customers); and
  5. Tangibles (the physical facilities and equipment, and the appearance of personnel).

6. "Most lawyers are technicians - researchers, writers, drafters. Because of the intensive training on the "work product" side (and lack of appreciation for or training on the "service side"), some lawyers even see clients as intrusions...."
- F. A survey of legal client satisfaction taken by the Missouri Bar and Prentice-Hall indicated the following:
  1. Why would the client hire that attorney again? Because he or she
    - a. Was friendly,
    - b. Was prompt and business-like,
    - c. Was courteous,
    - d. Was not condescending, and
    - e. He/she kept me (the client) informed.
  2. Why would the client **not** hire that attorney again? Because he or she
    - a. Had a superior attitude (said I couldn't understand because I wasn't a lawyer),
    - b. Was bored or indifferent (couldn't find my file in the pile on his desk),
    - c. Was impersonal (didn't know who I was),
    - d. Failed to keep me informed (I never knew what was going on), and
    - e. Was rude and brusque (he never came out to the waiting room; he didn't rise when I came in the room).

- G. What does it take to make a legal assistance office "client oriented?"
  - 1. Commitment from the leadership.
  - 2. Service training.
  - 3. Recognition of the factors clients use to judge quality of service.

## **VIII. CONCLUSION.**





# **CHAPTER C**

## **OFFICER AND NONCOMMISSIONED OFFICER EVALUATIONS**

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# OUTLINE OF INSTRUCTION

## I. REFERENCES.

- A. AR 623-1, Academic Evaluation Reporting System, 31 Mar 92.
- B. AR 623-105, Officer Evaluation Reporting System, 31 Mar 92.
- C. AR 623-105, Officer Evaluation Reporting System, 1 Oct 97 w/Change 1, 1 April 1998. Paragraph references to this regulation throughout this outline will be made to “NEW 623-105.” The change referenced here contained no substantive changes. It merely clarified the “phased” applicability of the new OER system for Reserve Components.

**Remember that the applicable regulation for reports and appeals of those reports is the regulation in effect *at the time the report is issued*. Thus, you must be familiar with BOTH the old and new systems and maintain copies of the old regulation.**

- D. AR 623-205, Noncommissioned Officer Evaluation Reporting, 31 Mar 92.
- E. Internet Resources:
  - 1. PERSCOM On-line: <http://www-perscom.army.mil>
  - 2. DA Publications Home Page: <http://www-usappc.hoffman.army.mil>

## II. INTRODUCTION.

## III. OFFICERS (Commissioned & Noncommissioned): MANAGERS, MENTORS, & LEADERS

- A. Why Have Evaluations?
  - 1. The Officer Evaluation System (OES) identifies those who are best qualified for promotion and assignment to higher responsibility. It also identifies officers who should be kept on active duty, those who should be retained in grade, and those who should be eliminated. (AR 623-105, para. 1-8(a)(1)).
  - 2. The Noncommissioned Officer Evaluation Reporting System (NCOERS) ensures “the selection of the best qualified noncommissioned officers to serve in positions of increased responsibility . . .” (AR 623-205, para. 1-5a.(2)).

3. Three types of evaluations (AR 623-105, para. 1-8a.(2)).<sup>1</sup>
- a. **Duty** Evaluations: The Officer Evaluation Report (OER) and Noncommissioned Officer Evaluation Report (NCO-ER) are used for these evaluations. The evaluation covers a specific period of time and covers performance and potential in a particular duty assignment during that time.
  - b. **School** Evaluations: The Academic Evaluation Report (AER) is used. The evaluation covers a specific period of time during which the officer attended a training school. The evaluation rates performance and potential in the school environment.
  - c. **Department of the Army (DA)** Evaluations: These are selection boards and personnel management decisions. They do not focus on any one period, but look at the officer's or NCO's entire career. These evaluations are critical and focus on potential. Three factors are considered:
    - (1) **Army Requirements:** The number of officers needed in each specialty and grade. AR 623-105, para. 1-8a.(3)(a); AR 623-205, para. 1-5a.(2)). The number of officers on active duty is determined by law in terms of strength by grade.
    - (2) **Officer or NCO Qualifications:** Consideration of the different skills, experience, background, and training needed for each specialty. (AR 623-105, para. 1-8a.(3)(c); AR 623-205, para. 1-5a.(2)). Potential is partly determined by comparing the officer or NCO to his peers.
    - (3) **Duty Performance:** The most important factor in determining potential. This is "judged by how well an officer performs his or her tasks and how well he or she meets officer corps professional values." (AR 623-105, para. 1-8a.(3)(b)). For NCOs, the NCO-ER provides "recognition for performance of duty [and] measurement of professional values and personal traits, . . ." (AR 623-205, para. 1-5a.(3)).

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<sup>1</sup> The NCOERS does not expressly list each of these types. NCOs, however, do receive each of these types of evaluations during the course of their careers.

4. Evaluations make possible the judgments needed to efficiently manage the officer corps. Particularly, the evaluation reports provide the information for DA to judge duty performance.

B. Professional Values

1. Timeless Values of Military Service

***Selfless Service -- Duty, Honor, Country***

Duty -- Honor -- Country. Those three hallowed words reverently dictate what you ought to be, what you can be, what you will be. They are your rallying points: to build courage when courage seems to fail; to regain faith when there seems to be little cause for faith; to create hope when hope becomes forlorn. Unhappily, I possess neither that eloquence of diction, that poetry of imagination, nor that brilliance of metaphor to tell you all that they mean. . . . But these are some of the things they do. They build your basic character, they mold you for your future roles as the custodians of the nation's defense, they make you strong enough to know when you are weak, and brave enough to face yourself when you are afraid. They teach you to be proud and unbending in honest failure, but humble and gentle in success; not to substitute words for actions, not to seek the path of comfort, but to face the stress and spur of difficulty and challenge; to learn to stand up in the storm but to have compassion on those who fail; to master yourself before you seek to master others; to have a heart that is clean, a goal that is high; to learn to laugh yet never forget how to weep; to reach into the future yet never neglect the past; to be serious yet never to take yourself too seriously; to be modest so that you will remember the simplicity of true greatness, the open mind of true wisdom, the meekness of true strength. They will give you a temper of the will, a quality of the imagination, a vigor of the emotions, a freshness of the deep springs of life, a temperamental predominance of courage over timidity, an appetite for adventure over love of ease. They create in your heart the sense of wonder, the unfailing hope of what next, and the joy and inspiration of life. They teach you in this way to be an officer and a gentleman.

*--General of the Army Douglas MacArthur*

***Impartiality - Worth's Battalion Orders***

But an officer on duty knows no one -- to be partial is to dishonor both himself and the object of his ill-advised favor. What will be thought of him who exacts of his friends that which disgraces him? Look at him who winks at and overlooks offenses in one, which he causes to be punished in another, and contrast him with the inflexible soldier who does his duty faithfully, notwithstanding it occasionally wars with his private feelings. The conduct of one will be venerated and emulated, the other detested as a satire upon soldiership and honor.

*-- Brevet Major William Jenkins Worth*

***Leadership - Schofield's Definition of Discipline***

The discipline which makes the soldiers of a free country reliable in battle is not to be gained by harsh or tyrannical treatment. On the contrary, such

treatment is far more likely to destroy than to make an army. It is possible to impart instruction and to give commands in such a manner and such a tone of voice to inspire in the soldier no feeling but an intense desire to obey, while the opposite manner and tone of voice cannot fail to excite strong resentment and a desire to disobey. The one mode or the other of dealing with subordinates springs from a corresponding spirit in the breast of the commander. He who feels the respect which is due to others cannot fail to inspire in them regard for himself, while he who feels, and hence manifests, disrespect toward others, especially his inferiors, cannot fail to inspire hatred against himself.

*-- Major General John M. Schofield*

2. The Army Ethic - The Character of a Leader. *See* General Dennis J. Reimer, *Leadership For The 21st Century: Empowerment, Environment And The Golden Rule*, Mil. Rev. (1996).
  - a. **“Courage.** General George C. Marshall, echoing Ridgway's sentiment, described the need for leaders with the moral courage to tell their superiors when they are wrong. ‘It is hard to get men to do this, for this is when you lay your career, perhaps your commission, on the line.’”
  - b. **“Candor.** Another character trait closely associated with courage is candor. Candor is a two-way street. Honesty is as important to a subordinate as it is to a superior. Mentoring and coaching are the best ways I know of to stamp out the zero defects mentality. . . . We must coach and mentor our young officers and NCOs and spend time with subordinates, talking with them face-to-face about their performance. Everyone wants feedback. We need to tell soldiers when they make mistakes and then coach them to succeed. Nothing is more important than taking the time to mentor subordinates. General William Creech, a great Air Force innovator and leader, said it best: ‘The first duty of any leader is to create more leaders.’ Part of mentoring is listening to soldiers. You can always learn from them.”
  - c. **“Competence.** A third character trait of good leaders is competence. As General Douglas MacArthur said, ‘There is no substitute for victory.’ The public trusts us with their most precious asset-their sons and daughters. They do not question what we do with them. They trust us to train them to survive on the battlefield. This is a tremendous responsibility and we, as leaders, must continue to earn that trust by our professionalism and competence. I count on leaders to not only know their jobs, but to strive to be the best in their respective fields.”

- d. **“Commitment.** The final character trait of a good leader is commitment. MacArthur had the best definition of commitment- ‘Duty, honor, country. These three hallowed words reverently dictate what you ought to be, what you can be, what you will be.’ Leaders today should be devoted to selfless service. Marshall said, ‘It is amazing what gets done when nobody worries about who gets the credit.’”
- 3. Army Values – L-D-R-S-H-I-P. *"Values are at the core of everything our Army is and does. Your commitment to living and teaching the Army's core values is critical to our success today and tomorrow."* GEN Dennis J. Reimer.
  - a. **Loyalty:** Bear true faith and allegiance to the U.S. Constitution, the Army, your unit, and other soldiers.
  - b. **Duty:** Fulfill your obligations.
  - c. **Respect:** Treat people as they should be treated.
  - d. **Selfless-Service:** Put the welfare of the nation, the Army, and your subordinates before your own.
  - e. **Honor:** Live up to all the Army values.
  - f. **Integrity:** Do what’s right, legally and morally.
  - g. **Personal Courage:** Face fear, danger, or adversity (Physical or Moral).

#### **IV. THE OFFICER EVALUATION REPORTING SYSTEM.**

- A. Evolutionary change to new system
  - 1. Erosion of senior rater profiles
  - 2. OLD system lasted 18 years.
  - 3. Masking LT reports when you make MAJ.
- B. Overview of the System



1. Functions of the System. (AR 623-105, para. 1-8b.(3) & (4)).
  - a. PRIMARY: Provide information to career managers for use in making personnel management decisions to include promotion, retention on active duty, elimination, reduction in force (RIF), command selection, and specialty designations. Each report must be a comprehensive appraisal of an officer's abilities, weaknesses, and potential.
  - b. SECONDARY: Encourage office professional development and enhance mission accomplishment.
2. Basic Aspects of the System. (AR 623-105, para. 1-8b(2)).
  - a. Allows rater to give shape and direction to the rated officer's performance.
  - b. Provides a chain of command evaluation of officer'
3. Critical Aspects of the System. (AR 623-105, para. 1-8b.(4)).
  - a. Stresses the importance of sound senior/subordinate relationships.
  - b. Stresses the importance of setting standards and giving direction for the performance of subordinates.
  - c. The key is effective communication.
4. Design of System Process.
  - a. Set objectives for the rated officer that support the organizations' mission.
  - b. Review the rated officer's objectives and update them to meet the current needs of the unit.

- c. Promote performance related counseling to develop subordinates and better accomplish the organizations' mission.
  - d. Assess the rated officer's potential.
  - e. Ensure review of the entire process.
- C. The Players in the System - "The Rating Chain." (AR 623-105, Chapter 2).  
Rating chains must correspond as nearly as practicable to the chain of command and supervision within an organization, regardless of component or geographical location. Rating chains will be published and distributed to each rated officer.

Rules for Establishing Rating Chains		
General Rules:	<ul style="list-style-type: none"> <li>✓ Commanders are responsible for establishing rating chains for the organization.</li> <li>✓ Commanders will normally rate commanders.</li> </ul>	
Rating Official	Requirements	
Rater	<ul style="list-style-type: none"> <li>✓ Normally the immediate supervisor of the rated officer.</li> <li>✓ Officer of US or Allied Forces or US Government Employee.</li> <li>✓ Senior in rank (or date of rank) to the rated officer.</li> </ul>	
Intermediate Rater	<ul style="list-style-type: none"> <li>✓ Officer of US or Allied Forces or US Government Employee.</li> <li>✓ Must be senior to the rated officer.</li> <li>✓ Normally included when there is a level of supervision between the rater and the senior rater.</li> </ul>	
Senior Rater	<ul style="list-style-type: none"> <li>✓ Officer of US or Allied Forces or US Government Employee.</li> <li>✓ Normally the supervisor of the rater and intermediate rater.</li> <li>✓ Minimum grade as indicated below</li> <li>✓ Must be senior in grade or date of rank to the rated officer, the rater, and the intermediate rater<sup>2</sup></li> </ul>	
When the Rated Officer is a:	The minimum grade of the senior rater must be:	
	Military Senior Rater	Civilian performing the senior rater function <sup>3</sup>

<sup>2</sup> The senior rater need not be senior in date of rank to the other rating officials if he/she is authorized to rate those officials. Additionally, under the *new* OER system, a senior rater need not be senior in grade or date of rank to an intermediate rater from a non-parent unit where a dual supervision situation exists.

<sup>3</sup> Supplementary review is required for some situations where the senior rater is a civilian. See para. 2-19, NEW AR 623-105; para. 3-13, AR 623-105.

*Judge Advocate Officer Basic Course*  
***Officer & Noncommissioned Officer Evaluations***

		GD Merit or General Schedule	Non-Appropriated Fund	Senior Executive Service
Warrant Officer 2d Lieutenant 1st Lieutenant (1LT)	Major or Captain(P) <sup>4</sup>	GM/GS13	UA-13	An SES may senior rate all officers if he is in the chain of supervision and is at least one level above the immediate supervisor.
1LT(P) <sup>5</sup> Captain (CPT)	Lieutenant Colonel or Major (P) <sup>3</sup>	GM/GS13	UA-13	
CPT(P) <sup>4</sup> Major (MAJ)	Colonel or Lieutenant Colonel (P) <sup>3</sup>	GM/GS15	UA-15	
MAJ(P) <sup>4</sup> Lieutenant Colonel (LTC)	Colonel or Lieutenant Colonel (P) <sup>3</sup>	GM/GS15	UA-15	
LTC(P) <sup>4</sup> Colonel (COL)	Brigadier General or Colonel (P) <sup>3</sup>	GM/GS16	UA-16	
COL(P) Brigadier General Major General	Senior to the rater and intermediate rater.			

D. The Flow of the System

1. STEP 1: The support form is completed.

a. Forms

(1) OLD: DA Form 67-8-1

(2) NEW: DA Form 67-9-1

(3) NEW: DA Form 67-9-1a

b. Responsibility of the **rated officer!**

<sup>4</sup> For a promotable officer to be qualified, they must be serving in a position authorized the higher grade. For example, a promotable captain must be serving in a Major's position to meet the minimum grade requirement. See para. 2-6, NEW AR 623-105; para. 3-11, AR 623-105.

<sup>5</sup> The promotable rated officer must be on a promotion list and be in a position authorized an officer of the next higher grade. For example, a promotable first lieutenant must be in a position authorized a captain for an O-5 senior rater to be required. See para. 3-16, NEW AR 623-105; para. 3-2, AR 623-105.

- (1) Considerable responsibility in the evaluation process. Take it seriously.
  - (2) Normally, completed within 30 days of assuming duty.
- c. The purpose is to promote a top down emphasis on leadership communication, integrating rated officer participation in objective setting, performance counseling, and evaluation.
  - (1) At the beginning of the rating period to enhance planning and relate performance to mission.
  - (2) During the rating period to encourage performance counseling and the best use of individual talent by continuous communication to update and revise the performance objectives.
  - (3) At the end of the rating period to allow the rated officer input to the OER.
- d. Rated Officer provided copies of rater & senior rater support forms. (AR 623-105, para. 3-6a.). The rated officer's support form should be prepared considering these support forms.
  - (1) Must have a face-to-face discussion of duties and objectives with rater within 30 days of the start of the rating period. During this discussion the duty description should be developed and major performance objectives established. Initials on the support form verify this discussion.

- (2) Make the duty description concise, but comprehensive. Explain legal duties in plain English for non-legal readers. Try to make objectives measurable. The duty description should accurately describe the principal duty performed. It should be specific and emphasize the required functions, and conditions peculiar to the assignment and the scope of responsibility to include where applicable, dollars, facilities, people, and types of and amount of equipment. The regulations list areas to consider when drafting objectives and duties. (AR 623-105, para. 3-5c.).
  - (3) The Senior Rater reviews and initials the form after initial and follow-up counseling. (AR 623-105, paras. 3-7f.(2) & 3-9).
- e. Follow-up Counseling.
  - (1) Must Counsel – Recorded on DA Form 67-9-1. This is an opportunity the rated officer, rater, and intermediate rater to communicate with the senior rater. Although it is an official document, the support form is not part of the official file used by selection boards or career managers.
  - (2) Timing Goals (DA PAM 623-105 at 4).
    - (a) Quarterly for LTs & WO1's
    - (b) Mid rating period (3-6 months) for CPTs & CW2s
    - (c) Field Grade - As needed.
    - (d) Failure to comply with any or all support from requirements will not constitute the sole grounds for appeal of an OER.
- f. Junior Officer Developmental Support Form (DA Form 67-9-1a). (AR 623-105, paras. 3-10 – 3-14).

- (1) Purpose: To assist in the rapid, equal, and fair transition and professional development of Army junior officers. The concept is to drive development and integrate it with performance. The form is used to build a developmental plan based on tasks that target the major performance objectives listed on the support form.
  - (2) Record at least one task for each doctrinal skill listed on form.
  - (3) Rater with rated officer's active participation directs process.
    - (a) Senior rater approves plan. The plan is put into effect only after senior rater approves.
    - (b) Plan is evaluated at mandatory quarterly counseling.
2. STEP 2: Assess objectives during the rating period. (AR 623-105, para. 4-4c.; AR 623-105, para. 3-4c.(2)).
  - a. The rated officer is responsible to periodically review the support form to ensure it properly reflects duties.
  - b. Make pen and ink changes on the working copy of the support form during the rating period after coordination with the rater.
3. STEP 3: Event requiring report to be generated occurs.
  - a. Mandatory Reports - Officer's "Rated Period" must be at least 90 days in the same position, under the SAME RATER, during the same rating period. Reports are required under whichever event occurs first. (AR 623-105, paras. 3-39 - 3-45).
    - (1) Annual Report - Required upon completion of 1 calendar year from the "Thru" date on the previous report.

- (2) Change of Rater Report - Required when the rated officer ceases to work under the immediate supervision of the rater and the minimum rating qualifications have been met..
  - (3) Change of Duty Report - Required when the rated officer has a change of principal duty, even if the rater remains the same.
- b. Mandatory Reports that DO NOT require the 90 day minimum time period. (AR 623-105, paras. 3-46 - 3-51).
- (1) Initial tour on active duty report.
    - (a) AMEDD, and JAGC only. Chaplains do NOT get an initial tour report under the new regulation.
    - (b) Period covered begins with date of entry on active duty OR the day after the through date on the last academic report and ends upon completion of **120 calendar days** (excluding non-rated periods) in the same principal duty assignment under the same rater.
    - (c) Rating chain qualification time limits DO apply.
  - (2) Officers participating in FLEP.
  - (3) Relief for cause report.
    - (a) Relief for cause is an early release of an officer from a specific duty or assignment directed by superior authority and based on a decision that the officer has failed in his or her performance of duty.
    - (b) Note that duty performance consists of not only completing assigned tasks in a competent manner, but also complying with professional standards (Part IV of DA Form 67-8 or 67-9) BOTH on and off duty.

- (c) Report is required REGARDLESS of the rated period.
  - (d) The report is rendered by the published rating chain at the time of the relief, regardless of time qualifications.
- c. Optional Reports. Reports submitted at the option of rating officials. (AR 623-105, paras. 3-52 - 3-56).
  - (1) Complete the Record report.
    - (a) Submitted on a rated officer who is about to be considered by a DA selection board for promotion, school, or command.
    - (b) Submitted at the RATER's option.
    - (c) Following condition must be met:
      - (i) Rated officer is about to be considered by a DA selection board for promotion, schooling, or command; and
      - (ii) Rated officer has served in the position at least 90 calendar days (excluding non-rated periods) in the same position under the same rater as of the date set by DA in the message announcing the board.
    - (d) Normal rating chain qualifications apply.
  - (2) Senior Rater option.



- (a) Issued at the outgoing SENIOR RATER's option when a change in senior rater occurs. This type of report SHOULD be rendered when a routine report would be due within the 60 days following the change of senior rater. Otherwise, the routine report would have to be submitted without a senior rater portion.
- (b) The following conditions must be met:
  - (i) Senior rater has served in that position for at least 60 calendar days;
  - (ii) The rater meets the minimum requirements to render a report; and
  - (iii) The rated officer has not received a report in the preceding 90 calendar days.
- (3) Rater option.
  - (a) Submitted at the rater's option.
  - (b) Applies when the rated period is less than 90 calendar days, but one of the events in paragraph a. (mandatory reports with 90-day minimum. i.e. change of rater, duty, annual) occurs.
  - (c) Rater may issue report IF the rated officer has served CONTINUOUSLY under the same rater in the same position for 90 days, including time from the preceding rating period. EXAMPLE: Officer receives annual report on 1 May. On 31 May, she PCSs to a new post (Change of Rater). The current rating period would be 30 days. If the rated officer worked for the same rater who issued the annual report, in the same position for which she received the annual report, the rater may at his option issue a report.

- (4) Sixty-day option.
  - (a) Applies only to officers serving in overseas short tours of 14 months or less.
  - (b) Rated period is less than the 90 days, but more than 59 days (excluding non-rated periods), and one of the events in paragraph a. above occurs (mandatory reports with 90-day minimum).
  - (c) Senior rater meets the minimum time requirement (60 days) and the senior rater approves.
- 4. STEP 4: Complete accomplishments on support form at the end of the rating period.
  - a. Rated officer completes this portion of support form at the end of the rating period. Tie the accomplishments to your objectives!
  - b. Don't be bashful, but don't be boastful.
  - c. Make sure numbers are absolutely accurate and consistent!!!!
- 5. STEP 5: A "Shell" of the report with the administrative data filled in is prepared.
  - a. The Rated Period. That period within the Period covered during which the rated officer serves in the same position under the same rater who is writing the report.
    - (1) Period Covered is the period extending from the day after the "Thru" date of the last report to the date of the event causing the report to be written. The Rated Period and the Period Covered always end on the same date but the beginning date may not be the same.
    - (2) Period Covered - Non-rated Time = The Rated Period.

- (3) Period Covered: The time (in months, days, and years) that the report covers. (AR 623-105, para. 3-16c.(1); & Glossary).
  - (a) Begins on the day AFTER the completion of the most recent evaluation report (AER or OER).
  - (b) Ends on the day the event causing the report to be generated occurs.
- (4) Non-rated Time. (AR 623-105, para. 3-16c.(2)). Non-rated Time is determined by the status of the rated officer.
  - (a) Period between leaving one duty position and beginning another, regardless of the number of days.
  - (b) Period(s) spent performing duties (or training) for which the officer does not meet minimum time requirements for a report.
  - (c) Period(s) of 30 or more CONSECUTIVE days where the officer is:
    - (i) On leave;
    - (ii) Absent Without Leave (AWOL);
    - (iii) In the hospital;
    - (iv) Convalescence leave;
    - (v) In confinement;
    - (vi) Under arrest;

- (vii) On permissive temporary duty (TDY);
  - (viii) On TDY or Special Duty (SD) serving as a member of a DA selection board or a court-martial.
  - (ix) On TDY or SD attending instruction scheduled for less than 60 days; or
  - (x) Attending CAS<sup>3</sup>.
- (5) Determine the “Rated Period” by counting the number of calendar days the rated officer has served under his or her present rater in his or her present duty position since the beginning of the rating period. Deduct from this total all non-rated periods. Do not count non-rated periods that occurred prior to the rating period covered.
- (a) The number of rated months is computed by dividing the rating period by 30.
  - (b) If 15 or more days are left – round up.
  - (c) Do not use the Period covered by the report to determine rated months.
- (6) The “Rated Period” determines whether an officer meets the time requirements for a particular type of report.
- b. Signature of Rated Officer
- (1) The rated officer **MUST** be the last person to sign the OER form. (AR 623-105, paras. 3-17c.(3) & c.(7))
  - (2) The RATER enters the APFT and Ht/Wt data. (AR 623-105, paras. 3-17c.(3) & 3-19.1)

6. STEP 6: Evaluations are completed in sequence.
  - a. Rater begins sequence. The rater is normally the immediate supervisor of the rated officer. The individual who directs and is most responsible for the rated officer's performance.
    - (1) As a general rule, the rater is senior in grade to the rated officer.
    - (2) Normally must serve as the rater for at least ninety days.
  - b. The rater completes through Part V of DA Form 67-8 or 67-9.
    - (1) Part III: Duty Description. Based on the entries in the support form (if appropriate). (AR 623-105, para. 3-18a.)
    - (2) Part IV: Professionalism. The OER form lists the Army values and the dimensions of the Army's leadership doctrine that define professionalism for the Army officer. These attributes apply across all grades, positions, branches, and specialties and are needed to maintain public trust and confidence and the qualities of leadership and management needed to maintain an effective officer corps.
      - (a) OLD System: (AR 623-105, para. 4-13) Designated attributes rated on a 1-5 scale (1 being high).
      - (b) As a practical matter, anything other than a 1 was a negative rating.
      - (c) NEW System: (NEW AR 623-105, para. 3-19).
      - (d) The section is divided into two parts -- Army Values and Leadership attributes/skills/actions.
      - (e) Rater checks "yes" or "no" for all values and leadership items. Any "no" entries MUST be explained in the rater's narrative (Part Vb).

- (f) For the leadership items, the rater must create a “leader word picture” by selecting 1 attribute, 2 skills, and 3 actions that best describe the rated officer’s strengths during the rating period.
- (3) Part IVc: APFT & Ht/Wt (AR 623-105, para. 4-13.1; NEW AR 623-105, para. 3-18.1)
  - (a) Under the old system, if a soldier met the body fat standards of AR 600-9, but exceeded the screening table weight, the rater was required to comment as follows: “Meets body fat standard of AR 600-9.”
  - (b) Under NEW system, that comment is no longer required. If meet the body fat standard, a YES is all that is required.
  - (c) Comments are mandatory for no entries.
- (4) Raters must indicate compliance with the JODSF in Part IV as well. (AR 623-105, para. 3-19.2)
  - (a) If the rater rates any LTs or WO1s, must indicate compliance
  - (b) If not, mark not applicable.
  - (c) Comments are mandatory for no entries.
- (5) Part V, Performance and Potential. (AR 623-105, para. 3-20).
  - (a) Performance evaluations are assessments on how well the rated officer met his or her duty requirements and adhered to the professional standards of the officer corps. Performance is evaluated by considering the results achieved, how they were achieved, and how well the officer complied with professional standards.

- (b) Potential evaluations are performance based assessments of the rated officer's ability compared with that of his or her contemporaries, which the rater and senior rater rates, or will rate, to perform in positions of greater responsibility or in higher grades. The rater will check a block rating the officer's potential for promotion compared with her contemporaries; give narrative comments on performance during the rating period; and give narrative comments regarding potential.
- (6) Performance:
  - (a) Results achieved consists of the degree to which the rated officer fulfills the duties and objectives that are assigned to him or her or implied by the duty position. Due regard is given to
    - (i) The efforts made by the rated officer
    - (ii) The results that could reasonably be expected given the time and resources available
  - (b) How the results were achieved consists of:
    - (i) The means used by the rated officer to reach his or her objectives
    - (ii) His or her use of available resources (personnel, equipment, money, and time)
  - (c) How well the officer complied with professional standards is determined by comparing his or her attributes, skills, and actions with the standards that apply to all officers.
- (7) Potential:

- (a) Comments should be specific and address, as appropriate, the officer's potential for promotion, military and civilian schooling, specific assignment and command.
  - (b) Raters must also include unique skills in the potential block, and must indicate a recommended Career Field for competitive category officers in the grades of O-3 through O-5. Examples include:
    - (i) Simulations
    - (ii) Language proficiency/fluency
    - (iii) Special computer skills
    - (iv) Advanced technical degrees
    - (v) Published author
- c. Intermediate Rater (if any) completes their portion. Use of an intermediate rater is intended to maintain the link between the rater and senior rater in situations where there is a level of supervision between them. If there is an intermediate rater, it is usually the rater's immediate supervisor. Normally, the Intermediate rater must serve in that capacity for a minimum of 60 days in order to evaluate the rated officer unless they were previously in the published rating chain. If you have an intermediate rater, they must make narrative comments.
- d. Senior Rater. (AR 623-105, para. 3-22)
  - (1) Must be senior to the rated officer and must be at least a major, Captain promotable serving in a major's position, or a GS-13. Normally, must be in the position for sixty days during the rating period unless previously in the published rating chain.



- (2) Provides an independent evaluation of officer's potential, comparing that officer to all other officers of the same rank, that he rates or has rated.
- (3) The senior rater should focus on potential and future assignments but may also address performance. The senior rater's additional experience, lends a broad organizational perspective to the evaluation. The senior rater's evaluation is the link between the day to day observation of the rated officer's performance and the longer term evaluation of the rated officer's potential by DA selection boards.
  - (a) The senior rater first rates the officer's potential for promotion to the next higher grade compared to all officers in the same grade as the rated officer. The senior checks "best qualified," "fully qualified," or "do not promote."
  - (b) The senior rater then checks one of four blocks. "Above Center of Mass," "Center of Mass," "Below Center of Mass-Promote," or "Below Center of Mass-Do Not Promote." Senior raters must have less than 50% of the officers they rate at that grade in the "Above Center of Mass" block. DA enforces this requirement through a labeling process described below.
- (4) Anything unusual about the report will be noted in the senior rater's narrative (i.e. lack of support form, compliance with JODSF, or PT/Height/Weight issues.)
- (5) The senior rater should be assessing the officer with a view to three to five years out and must list 3 future assignments suitable for the officer.
- (6) Provides the final chain of command review of the report to ensure it is correct and accurate. The senior rater should ensure that the rating officials have counseled the rated officer throughout the rating period on meeting objectives and complying with the professional standards of the officer corps.

- e. Ratings generally:
    - (1) Rating officials must prepare reports that are accurate and as complete as possible. This responsibility is vital to the long-range success of the Army's mission. With due regard for the officer's current grade, experience, and military schooling, evaluations should cover failures as well as achievement. However, evaluations will normally not be based on a few isolated minor incidents.
    - (2) Rating officers have a responsibility to balance their obligations to the rated officer with their obligations to the Army. Rating officials must make honest and faire evaluations of officers under their supervision.
  - f. Rating officials must not:
    - (1) Consider duty as a court-martial member when preparing an OER
    - (2) Comment or give an unfavorable rating to a rated officer because he or she zealously represented (as a counsel) any accused or respondent before a court-martial or administrative board proceeding.
    - (3) Comment or give an unfavorable rating to a rated officer because of his or her duty as an equal opportunity officer or his or her enthusiasm for implementing the Army's EO program or in retaliation for criticism of command policies and practices related to that program.
7. STEP 7: The report is processed through HQDA.
- a. The report is processed through the local personnel services company to the officer's branch at HQDA.

- b. Batch processing: OERs are batch processed and incremented against the senior rater profile on the day they are received at DA. (AR 623-105, para. 3-23d.) This is critical under the NEW system since less than 50% of rated officers can be in the “Above Center of Mass” block.
- c. The HQDA Electronically Generated Label. (AR 623-105, para. 3-23)
  - (1) Part VIIb. (Senior Rater potential block check) is replaced on the final report with an electronically generated label.
  - (2) The label contains a statement reflecting the block checked by the senior rater. (“Center of Mass,” etc.)
  - (3) If the senior rater’s profile has 50% or more of officers in that grade in the “Above Center of Mass Block,” the label will say “Center of Mass” even though the senior rater checked the “Above Center of Mass” block. Because the label overlays the original portion, there will be NO indication of the senior rater’s original block check.
  - (4) To avoid problems, the regulation recommends that senior rater’s maintain a “cushion” in their top block by rating only 1/3 of their officers in each grade in that block. (AR 623-105, para. 3-22c.(2)(c)).
  - (5) Senior raters are PROHIBITED from mentioning their actual block check in their narrative comments! (AR 623-105, para. 3-22c.(3)).
- d. The report is finally reviewed for administrative accuracy and then placed on the officer’s OMPF.

## **V. THE NONCOMMISSIONED OFFICER EVALUATION SYSTEM.**

- A. Purpose. Similar to officer system.

1. Strengthen the NCO Corps through the inculcation of Army values and basic NCO responsibilities.
2. Ensure the selection of the best qualified NCOs for promotion and increased responsibility.
3. Improve performance Army-wide through an emphasis on performance counseling.

**B. Rating Chain.**

1. Rated NCO. The subject of the report.
2. Rater.
  - a. Immediate supervisor of the rated NCO
  - b. Must be designated for a minimum of 90 days.
  - c. Must be a Sergeant or higher and senior to the rated NCO. U.S. Civilians may rate NCOs. They must be in the grade of GS-6 or above. Members of allied forces may NOT rate NCOs.
3. Senior rater.
  - a. A person in the direct line of supervision of the rated NCO who is senior to the rater.
  - b. Must serve for a minimum of two months.
  - c. Military need only be senior to the rater. Civilians must be at least a GS-6 and be senior to the rater. Members of Allied Forces may NOT serve as Senior Raters.
4. Reviewer.

- a. A commissioned/warrant officer or sergeant major or higher in the direct line of supervision of the rated NCO.
- b. No minimum time requirement.
- c. Civilians must be GS-9 or higher. Civilians may only serve if either the rater or senior rater is a uniformed official. Allied forces may NOT serve as reviewer.
- d. Rating overwatch role. No comments unless they disagree with the rater and/or senior rater.

C. Forms.

- 1. DA Form 2166-8-1 (NCO Counseling Checklist/Record).
  - a. Used as guide to prepare, conduct, and record counseling sessions with the rated NCO.
  - b. Use is mandatory.
  - c. Initial counseling must occur within first 30 days of rating period.
  - d. Thereafter, counseling sessions will be conducted on at least a quarterly basis.
- 2. DA Form 2166-8 (NCOER).
  - a. Five part form.
  - b. Bullet comments.
    - (1) Short concise statements no longer than two lines; preferably one.
    - (2) Starts with action verbs or possessive pronouns (his/her)
    - (3) Must be double space between bullets.

- (4) Begin with small letter "o" to designate start of comment.
  - (5) Specific bullet comments are mandatory for "excellence" or "needs improvement" ratings.
- c. No numerical scores.

## **VI. CONCLUSION**

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# CHAPTER D

## ARMY OFFICER AND NONCOMMISSIONED OFFICER EVALUATION REPORT APPEALS

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## **OUTLINE OF INSTRUCTION**

### **I. REFERENCES.**

- A. AR 623-1, Academic Evaluation Reporting System, 31 Mar 92.
- B. AR 623-105, Officer Evaluation Reporting System, 31 Mar 92.
- C. AR 623-105, Officer Evaluation Reporting System, 1 Oct 97. w/Change 1, 1 April 1998. Paragraph references to this regulation throughout this outline will be made to "NEW 623-105." The change referenced here contained no substantive changes. It merely clarified the "phased" applicability of the new OER system for Reserve Components.

**Remember that the applicable regulation for reports and appeals of those reports is the regulation in effect *at the time the report is issued*. Thus, you must be familiar with BOTH the old and new systems and maintain copies of the old regulation.**

- D. AR 623-205, Noncommissioned Officer Evaluation Reporting 31 Mar 92.
- E. Internet Resources:
  - 1. PERSCOM On-line: <http://www-perscom.army.mil>
  - 2. DA Publications Home Page: <http://www-usappc.hoffman.army.mil>

### **II. INTRODUCTION.**

### **III. ELEMENTS OF THE OER SYSTEM.**

- A. Communication. Affords the rated officer a forum for establishing duty requirements and discussion of actual accomplishments.
- B. Provides regulatory requirements
  - 1. Each report must stand alone

2. Prohibition against command influence
3. Referral process
4. Commander's Inquiry
5. Appeals System
6. Army Board for Correction of Military Records.

**IV. PURPOSE OF THE APPEAL PROCESS.** (AR 623-105, para. 6-2; AR 623-205, Para. 4-1.) It is a redress program. Allows for both preventive and corrective action.

- A. Protects Army's interest.
- B. Ensures fairness to the rated soldier.
- C. Avoids impugning the integrity or judgment of the rating officials.

**V. EXCEPTIONAL PROCESSING PROCEDURES.**

- A. Referred reports (officers only) (AR 623-105, paras. 3-32 & 3-33).
  1. Certain reports will be referred to the rated officer by the senior rater for acknowledgment and comment
    - a. Relief for cause (AR 623-105, para. 3-50; AR 623-205, para. 2-10.)
    - b. Reports containing negative remarks about values, leader attributes, skills, or actions in the rating official's narrative
    - c. Any report with NO in Parts IVa-c

- d. Any report with unsatisfactory performance or Do not promote or narrative comments to that effect
  - e. Any below center mass report
  - f. Any report with negative comments in Part Vb, VI, VIIc
  - g. Any report with an entry of FAIL in Part IVc or No for weight standards.
2. Rated officer's may comment if he believes rating or remarks are incorrect
- a. comments are attached to the report but do not constitute an appeal or a request for a commander's inquiry.
  - b. Comments must be factual, concise, and limited to matters directly related to the evaluation on the OER (should be new information, nothing already in the officer's file).
  - c. Rating officials may not rebut the rated officer's comments.
3. Based on the rated officer's comments, the rater or senior rater may reconsider the OER. The senior rater may request the rater reconsider a rating or comment but can not pressure or influence.
- B. Commander's inquiry. (AR 623-105, paras. 6-3 & 6-4; AR 623-205, para. 2-15.)
- 1. Provide a greater degree of command involvement in preventing obvious injustices to the rated officer and correcting errors before they become a matter of permanent record. Commander's inquiries are not used to document differences of opinion between members of the rating chain about an officer's performance and potential.
  - 2. Commanders are required to look into alleged errors, injustices, and illegalities. The inquiry is conducted by the commander in the chain of command above the designated rating officials involved in the allegations. Informal procedures are used.

3. Must be requested by the rated officer
  4. Not a prerequisite or substitute for appeal.
  5. Results can be forwarded to HQDA and may become part of the OMPF.
- C. Modifications to Submitted Reports. (AR 623-105, Chapter 3, Section X.)
1. Basic rule - OERs and NCO-ERs received by HQDA and included in the official records are presumed:
    - a. To be administratively correct
    - b. Have been prepared by the properly designated rating officials
    - c. Represent the considered opinions and objective judgment of the rating officials at the time of preparation.
  2. Requests to withdraw or modify report will not be granted unless new or unverified information would change rating.
    - a. If new information is favorable, follow regular appeal procedures.
    - b. If new information is derogatory, prepare an addendum, refer to rated officer, and submit.

## **VI. EVALUATION REPORT APPEALS** (AR 623-105, Chapter 6; AR 623-205, Chapter 4.)

- A. Types of Appeals.
1. Administrative (AR paras. 6-6h.; AR 623-205, para. 4-2h.)

- a. Errors in parts I, II, IIIb, and Va of DA Form 67-8 (OER); parts I, II, IIIb, c, d, and IVc of DA Form 67-9 (NEW OER); parts I and II of DA Form 2166-7 (NCOER); or similar items on other forms.
  - b. Includes such things as deviation from the established rating chain, insufficient period of observation by the rating officials, and errors in the period covered.
  - c. Rated officer's authentication in Part II verifies the information in Part I. Confirms that the rating officials named in Part II are those established as the rating chain and authenticated the accuracy of the APFT and height/weight entires.
  - d. Appeals in these areas will be accepted only under the most unusual and compelling circumstances.
  - e. Rated officer's signature also verifies that the rated officer has seen a completed OER.
  - f. Correction of minor administrative errors seldom serves as a basis to invalidate an evaluation appeal.
2. Substantive (AR 623-105, para. 9-2i.; AR 623-205, para. 4-2i.)
- a. Bias or prejudice
  - b. Inaccurate or Unjust Ratings
  - c. Any other matter that is not administrative.
  - d. NOTE: APFT Score & Height weight data are SUBSTANTIVE for NCOERs!
  - e. Pleas citing past or subsequent performance or assumed future value to Army are rarely successful.
3. Combined Administrative & Substantive

B. Who can Appeal

1. The rated officer
2. Office of the Deputy Chief of Staff for Personnel (ODCSPER)
3. U.S. Total Army Personnel Command
4. Office of the Judge Advocate General

C. Potential Bases for the Appeal.

1. Deviation from regulation.
  - a. Report refers to conduct outside rating period. (AR 623-105, paras. 3-24; AR 623-205, para. 6-4)
  - b. Comments are not limited to the forms. Report cannot contain continuation sheets. (AR 623-105, paras. 3-25; *see* AR 623-205, para. 6-8)
  - c. Narrative gimmicks are contained in the report. (AR 623-105, paras. 3-26; AR 623-205, para. 6-7d.) The following will not be used:
    - (1) Brief, unqualified superlatives or phrases, particularly if they may be considered trite
    - (2) Too brief comments because they need to be interpreted
    - (3) Bullet comments (OER only) or any technique aimed at making specific words, phrases, or sentences stand out from the rest of the narrative (i.e. underlining, excessive use of capital letters, italics, or exaggerated margins).

- d. Reference is made to unproven derogatory information. (AR 623-105, para. 4-21; AR 623-205, para. 6-5). The report can only reference actions or investigations that have been completed, adjudicated, and had final action taken. Verified derogatory information may be entered on an OER.
  - e. A rating official has been required to change a report. (AR 623-105, paras. 3-27; AR 623-205, *see* para. 3-10c.(1)(c))
  - f. Inappropriate comments have been included. (AR 623-105, paras. 3-28 – 3-31; AR 623-205, para. 2-17, 6-6, 6-13, 6-14). For example:
    - (1) use of inappropriate or arbitrary remarks or comments that draw attention to differences relating to race, color, religion, gender, age, or national origin
    - (2) evaluation comments shall not be based solely on an officer's or NCOs marital status
    - (3) evaluation comments shall not be made about the employment, education, or volunteer activities of an officer's or NCOs spouse unless exceptional circumstances (i.e. CPT Doe did an outstanding job despite her husband's illness)
  - g. Adverse report not referred to officer for comment. (officers only) (AR 623-105, paras. 3-32).
- 2. Error in the senior rater profile. (*See* AR 623-105, para 3-22.)
  - 3. Failure to counsel or to comply with support form procedures. (*See* AR 623-105, Chapter 3, Sections II & III; AR 623-205, para. 6-2)
  - 4. Mistake made in preparing or typing the report.
  - 5. Bias or prejudice on the part of a rating official.



- D. When Must the Appeal be Filed? (AR 623-105, para. 9-3; NEW 623-105, para. 6-7; AR 623-205, para. 4-3)
1. Administrative appeals: No prescribed time limit. Administrative appeals will be reviewed using the regulation in effect at the time the report was rendered.
  2. Substantive appeals:
    - a. DA Form 67-8: Must be filed within 5 years of the completion date of the report absent exceptional circumstances.
    - b. DA Form 67-9: Must be filed within 3 years of the completion date of the report absent exceptional circumstances.
  3. Because OERs/NCOERs are used for personnel management decisions, it is important to Army and individual officers and NCOs to correct erroneous reports as soon as possible. Prompt submission is recommended. The likelihood of successfully appealing a report diminishes with the passage of time.
  4. Failure to file an substantive appeal on time is excused only if the appellant provides exceptional justification to warrant this exception.
- E. Priority system for resolving appeals. (AR 623-105, para. 6-9; AR 623-205, para. 4-6.)
- a. First Priority.
    - (1) Officers and NCOs twice nonselected for promotion with mandatory release date within six months.
    - (2) Certain officers and NCOs selected for involuntary discharge within six months. Officers identified for referral within six months by a DA Active Duty Board or a AGR continuation board.

- (3) Officers recommended for elimination board including officers denied Voluntary Indefinite (VI) status.
  - b. Second Priority.
    - (1) Officers and NCOs once nonselected for promotion.
    - (2) Officers pending promotion list removal
  - c. Third Priority: all others.
- F. Standard of Evidence and Burden of Proof. (AR 623-105, para. 6-10; AR 623-205, para. 4-7.)
  - 1. OER/NCO-ERs received at HQDA are presumed administratively correct, prepared by proper officials, and accurate.
  - 2. Appellants have the burden of proving by clear and convincing evidence that:
    - a. Presumption of regularity should not apply.
    - b. Action is warranted to correct a material error, inaccuracy, or injustice.
  - 3. Evidence must be competent, material, and relevant to the claim.
  - 4. Examples of insufficient evidence:
    - a. Rated officer's statement.
    - b. Statement from rater alleging error in judgment, administrative oversight, or typographical error.
    - c. Statements or documents showing outstanding performance during unrelated periods.

- d. Appeal based on fact that information on the support form isn't included on the OER/NCOER.
- e. Appeals that claim an error in sequencing of OERs will not be accepted.
- f. Appeals that claim an inaccurate center of mass report in order to preserve above center of report for other officers.
- g. Statements from the rating officials that they underestimated the rated officer
- h. Statements from the rating officials that they did not intend to rate the officer as they did.

G. Preparing the Appeal.

- 1. Military memorandum format. (AR 623-105, Appendix F & Figures in Chapter 6; AR 623-205, Appendix F.)
  - a. Include name, rank, branch, SSN, period of report, and priority of the appeal.
  - b. Prepare a concise explanation of defect and requested corrective action. (Attach supplemental statement if lengthy).
    - (1) State succinctly what the appellant is appealing and the basis of the appeal
    - (2) Is the entire report contested or only a specific part
    - (3) What is the basis for the belief the rating officials were not objective (personality conflict alone isn't enough unless it also resulted in an inaccurate or unjust evaluation.

2. Attach supporting documentation, statements, and the contested OER/NCO-ER. Statements must be the originals. Other documents must be certified copies.
  - a. Administrative appeals
    - (1) Published rating chain
    - (2) Assignment, travel or TDY orders
    - (3) SIDPERS documents
    - (4) Leave records
    - (5) Organization manning documents
    - (6) Statements of personnel who knew the situation
    - (7) Commander's inquiry
  - b. Substantive appeals
    - (1) Statements from 3d parties or rating officials (who have knowledge of appellants performance during the rating period)
      - (a) If possible – persons who served in positions affording them good opportunity to observe firsthand, the appellant's performance as well as the appellant's interaction with rating officials
      - (b) Statements from rating officials if they relate to allegations of factual errors, erroneous perceptions, or claims of bias

- (2) Statements including specific details of events or circumstances leading to inaccuracies, misrepresentations, or injustice at the time the report was rendered.
  - (3) Results of commander's inquiry
- c. Other documents must be certified copies.
- 3. JAG offices will assist soldiers who request advice about preparing and submitting appeals. (TJAG Policy Letter 84-2 and AR 27-3).

#### H. Processing the Appeal.

- 1. Appeals based on administrative error.
  - a. Adjudicated by Appeals and Corrections Branch, Personnel Command (PERSCOM) for OERs (AR 623-105, para. 6-6h.) and by NCO Evaluation Report Appeals Section (Active Army), U.S. Army Records and Evaluation Center (USAREC) for NCO-ERs (AR 623-205, para. 4-2).
  - b. Errors in parts verified by rated officer accepted only under unusual circumstances.
  - c. Correction of minor errors will not invalidate an entire OER or NCO-ER.
  - d. Prove errors with certified copies of appropriate documents.
- 2. Appeals based on substantive error (AR 623-105, paras. 6-6i. & 6-11; AR 623-205, para. 4-9).
  - a. Screened by PERSCOM (OERs) or USAREC (NCO-ERs).

- b. OERs adjudicated by DCSPER Officer Special Review Board (OSRB) (AR 623-105, para. 6-11). NCO-ERs adjudicated by DCSPER Enlisted Special Review Board (ESRB) (AR 623-205, para. 4-2).
  - (1) Composed of at least three senior officers for OER appeals and three senior noncommissioned officers for NCO-ER appeals.
  - (2) Senior to the appellant and one with similar background if possible.
  - (3) Board recommendation based on majority vote.
- c. DCSPER board procedures. (AR 623-105, para. 6-11b.; AR 623-205, para. 4-8.)
  - (1) Administrative, nonadversarial.
  - (2) Not bound by rules of evidence but evidence must be competent, material and relevant.
  - (3) No right to appear in person.
  - (4) May contact interested parties directly.
- 3. An appeal may be approved in whole, in part, or denied.
  - a. The relief may be different than that requested.
  - b. Board will not usually worsen appellant's position.
- 4. If the appeal is approved:
  - a. Document is either corrected or deleted.

- b. Memo is placed in OMPF performance fiche.
    - c. If appellant is a promotion passover, OSRB/ESRB determines whether to grant a relook board.
  - 5. If the appeal is denied:
    - a. Notification letter is sent to the appellant.
    - b. Copy of letter is placed in OMPF performance fiche.
    - c. Appeal correspondence placed in restricted OMPF.
  - 6. A case summary of board's consideration is available to the appellant.
- I. Reconsideration of Appeals.
  - 1. No provisions for requesting reconsideration for OER appeals.
  - 2. Appellants may submit a new appeal to the OSRB/ESRB based on new information or additional evidence. (AR 623-105, para. 6-8f; AR 623-205, para. 4-5.
  - 3. Appellants may appeal Board's decision to the Army Board for Correction of Military Records (ABCMR).

## **VII. OTHER REMEDIES (IF THE APPEAL FAILS)**

- A. The Army Board For Correction Of Military Records (ABCMR).
  - 1. ABCMR may correct any military record when necessary to correct an error or remove an injustice. (10 U.S.C. § 1552; AR 15-185).
  - 2. Consult AR 15-185 for procedures.

3. ABCMR has broad power to recommend corrective action and fashion an appropriate remedy.
  - a. Claimants must specifically request monetary settlements.
  - b. The Secretary of the Army approves ABCMR recommendations on OER/NCO-ER appeals.

B. Judicial Review.

1. Jurisdiction over OER/NCO-ER Appeals.
  - a. U.S. Court of Federal Claims has jurisdiction over money claims founded upon the Constitution, any Act of Congress, or any regulation of an Executive Department. (28 U.S.C. § 1491).
  - b. U.S. District Courts have concurrent jurisdiction of money claims under \$10,000. (28 U.S.C. §1346).
2. Exhaustion of administrative remedies.
  - a. General Rule: ““A party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself.”” Howell v. Immigration & Naturalization Service, 72 F.3d 288, 291 (2d Cir. 1995) (Howell contains a good summary of the exhaustion requirement.)
  - b. Supreme Court Limitation on Exhaustion: Federal courts may not require exhaustion of available administrative remedies under the APA before judicial review of agency action where exhaustion not expressly required by statute, Darby v. Cisneros, 113 S.Ct. 2539 (1993). Note that this is an exception for the APA, NOT a blanket reversal of the exhaustion doctrine. *See Howell* above.
  - c. ABCMR specifically:



- (1) Majority view - appellant must exhaust ABCMR remedies. Exhaustion applied strictly in military cases. Guitard v. Sec'y of the Navy, 967 F.2d 737 (2d Cir. 1992); *see also* Horn v. Schlesinger, 384 F.Supp. 506 (E.D. Mo. 1974), aff'd 514 F.2d 549 (8th Cir. 1985).
- (2) Minority view - exhaustion of ABCMR remedy is permissive only. Horn v. United States, 671 F.2d 1328 (Ct. Cl. 1982). But note that the Federal Circuit is in accord with the minority view, Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986), Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983).

3. Laches.

- a. An OER must be challenged within a reasonable time after it is issued. Adkins v. United States, 328 Ct. Cl. 909 (1981).
- b. Government is entitled to dismissal of an OER appeal if it can show inexcusable delay and prejudice. Pepper v. United States, 794 F.2d 1571 (F. Cir. 1986).

4. Standard of Review.

- a. Decisions of the ABCMR are reviewable in federal court. Jamison v. Stetson, 471 F. Supp. 48 (D.C. N.Y. 1978). *See also*, Randall v. United States, 95 F.3d 339, 348 (4th Cir. 1996).
- b. Decisions by Service Secretaries to follow/not follow ABCMR advice may be reviewable as well. Adkins v. United States, 68 F.3d 1317, 1322-23 (Fed. Cir. 1995).
- c. A party is bound by the ABCMR decision unless the decision is unsupported by substantial evidence or is arbitrary, capricious, or contrary to law. Randall, *supra*, at 348, *citing* Chappell v. Wallace, 462 U.S. 296, 303 (1983); Robbins v. U.S., 29 Fed. Cl. 717, 725 (1993).

- d. Courts apply a strong but rebuttable presumption that officers have discharged duties correctly, lawfully, and in good faith. Guy v. United States, 608 F.2d 867 (Ct. Cl. 1979).
- e. Courts will not interfere with rating process unless there is clear and convincing evidence of factors affecting ratings which had no place in the rating process. Savio v. United States, 213 Ct. Cl. 737 (1977).

5. Examples of Successful Appeals.

- a. Labeling an OER as an "Adverse Efficiency Report" by mistake. Horn v. United States, 671 F.2d 1328 (Ct. Cl. 1982).
- b. OER downgraded on mistaken belief superiors would not approve a high rating. Skinner v. United States, *supra*.
- c. Signing blank OER, rating downgraded by another. Hary v. United States, 618 F.2d 704 (Ct. Cl. 1980).
- d. Violation of regulation. Riley v. United States, 608 F.2d 441 (Ct. Cl. 1979).

6. Examples of Unsuccessful Appeals.

- a. Plaintiff did not show that ABCMR acted arbitrarily or capriciously in denying challenge based on racial discrimination. Randall, *supra*.
- b. Intentional downgrade in rating to show future job progression. Stewart v. United States, 611 F.2d 1356 (Ct. Cl. 1979).
- c. Using words and phrases from previous OERs and endorser's instructions to rater to downgrade rating. Gruendyke v. United States, 639 F.2d 745 (Ct. Cl. 1981).

- d. Rater claiming he rated appellant too low. Tanaka v. United States, 538 F.2d 348 (Ct. Cl. 1976). See also Savio v. United States, supra.
- e. Contested OER inconsistent with prior and subsequent OERs. Grieg v. United States, 640 F.2d 1261 (Ct. Cl. 1981).

7. Judicial Remedies.

- a. Courts may award backpay to successful appellant. Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979).
  - (1) Award is offset by civilian pay earned.
  - (2) Award cannot be based on an anticipated promotion.
- b. Courts may order removal of an OER/NCO-ER. Skinner v. United States, supra.
- c. Appellants can be reinstated in the service with their consent. Yee v. United States, 512 F.2d 1383 (Ct. Cl. 1975).
- d. Courts may order that a nonprejudicial statement be placed in appellant's file. Sanders v. United States, supra; Yee v. United States, supra.
- e. Under limited circumstances, courts may void promotion passovers and order relook boards.
  - (1) Harmless error standard applied. Riley v. United States, supra.
  - (2) Appellants must show a nexus between the board's action and the defective OER/NCO-ER. Harry v. United States, supra; Sanders v. United States, supra.
- f. Courts will not:

- (1) Order promotions be made. *Yee v. United States, supra*; *Skinner v. United States, supra*.
- (2) Reconstruct a report or order the Army to prepare a favorable OER to replace a defective OER. *Turner v. Dept. of Army*, 447 F. Supp. 1207 (D.D.C. 1978).

## **VIII. CONCLUSION**

**CHAPTER E**  
**INTRODUCTION TO FAMILY LAW**

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# INTRODUCTION TO FAMILY LAW

## *OUTLINE OF INSTRUCTION*

### I. INTRODUCTION:

“I was married by a judge. I should have asked for a jury.”

— Groucho Marx

### II. WEB SITES & REFERENCES

- A. State Marriage Laws: [www.law.cornell.edu/topics/state\\_statutes.html](http://www.law.cornell.edu/topics/state_statutes.html)
- B. State Divorce Laws: [www.law.cornell.edu/topics/Table\\_Divorce.htm](http://www.law.cornell.edu/topics/Table_Divorce.htm)
- C. Common Questions: <http://family-law.freeadvice.com>
- D. Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408 (2000).
- E. Uniform Interstate Family Support Act (UIFSA), 42 U.S.C. § 1408 (2000).

### III. MARRIAGE

- A. Historical Perspective.
  - 1. Purposes.
    - a. Religious
    - b. Economics/politics

- c. Social institution
    - d. Romantic alliance (later development)
  - 2. Types.
    - a. Ceremonial.
    - b. Common Law
- B. The Legal perspective: Restraining the worst misbehaviors between people in special relationships and resolving people's most stubborn disputes.
- C. Requirements for a Valid Ceremonial Marriage.
  - 1. License—required by all states.
  - 2. Physical exam—not required in every state.
  - 3. Capacity to marry.
    - a. Age—varies state to state.
      - (1) Alabama and South Carolina allow females to marry at age Twelve with consent of a parent.
      - (2) Majority of states allow marriage at age Eighteen or age Sixteen (with consent of a parent).
    - b. Mental capacity to contract.
  - 4. No living spouse. *See* UCMJ art.134 (Bigamy).
    - a. Void as a matter of law in several states.

- b. Voidable in other states.
- 5. Parties are unrelated by blood or marriage.
  - a. Universal ban—members of nuclear families and grandparents/grandchildren.
  - b. Jurisdictional variances.
    - (1) First cousins.
    - (2) Aunt/nephew and uncle/niece.
    - (3) Adopted children and step-relatives.
- 6. No legal incapacity to marry.
- 7. Intent to marry.
- 8. Solemnization by authorized official.
- 9. Consummation is not a prerequisite for a valid marriage.
- D. Effects of Noncompliance with Statutory Requirements.
  - 1. Failure to obtain a license.
    - a. A few states declare such marriages void.
      - (1) *Williams v. Williams*, 460 N.E.2d 1226 (Ind. App. 1984) (holding void a marriage contracted without a license).
    - b. The majority view considers the marriage valid.



- (1) *Yun v. Yun*, 908 S.W.2d 787 (Mo. Ct. App. 1995). The Yuns lived in Missouri but married in a church in Kansas in November 1986. No evidence of a license. In February 1990, Mr. Yun obtained a Kansas marriage license and filed it 26 June 1990 alleging marriage date of 3 June 1990. Mrs. Yun filed for divorce in 1993; Mr. Yun sought to avoid dissolution, property settlement and child support by alleging there was never a marriage. Court recognized the marriage.
- (2) *Lambertini v. Lambertini*, 655 So.2d 142 (Dist. Ct. of App. FL 1995). Parties obtained a Mexican divorce for Mrs. Lambertini from her first husband and a Mexican marriage license—Thirty years later Mrs. Lambertini files for divorce and Mr. Lambertini asserts no marriage (and therefore no alimony or property division) because the license was not valid and therefore the marriage was void *ab initio*. The court recognized the marriage.

2. Defective, invalid, or spuriously obtained license—marriage is valid.
3. Failure to obtain a physical—marriage is valid.
4. Unauthorized solemnizing official—marriage is valid unless the parties knew of the problem. *See generally State v. Lynch*, 272 S.E.2d 349 (1980) (holding that members of Universal Life Church, who under the rules of that Church, may become ministers for life merely by asking to be ordained and without any qualifications, were not eligible to perform marriages under a statute requiring proof of ordination with regular communion with his religious society).

E. Conflicts of Law.

1. General rule: a marriage valid under the law of the jurisdiction where celebrated is valid everywhere.

2. Neither party need be a domiciliary of the jurisdiction where the marriage is performed.

3. General Overview:

a. Void = polygamy or marriages between persons who are too closely related.

b. Voidable = insufficient age, fraud, duress, sham, physical disability (disease or incurable impotence), mental disability.

F. Common Law Marriages.

1. Two types:

a. "Traditional" common law marriage entered into without formalities.

b. Valid marriage arising from invalid marriage after impediment is removed.

(1) For example, despite a party's underage status at the time of marriage, continued cohabitation as husband and wife after reaching majority results in the marriage ripening into validity.

(2) Note that courts may be reluctant to find a valid marriage when the parties entered into a relationship knowing it to be polygamous, even after the impediment to marriage has been terminated.

2. States recognizing formation of "traditional" common law marriages: AL, CO, DC, GA (only if before 1 Jan 97), ID (only if before 1 Jan 96), IA, KS, MT, OH (only if before 10 Oct 91), OK, PA, RI, SC, & TX.

3. Requirements for formation.
  - a. Express mutual consent and intent to be married.
  - b. Parties "must hold themselves out to the world as being married," or "must openly and professedly live as husband and wife" in most states.
4. Conflict of laws.
  - a. Most jurisdictions recognize common law marriages as valid if the marriage was formed in a state that allows their formation.
    - (1) *White v. State Farm Mutual Automobile Insurance Company*, 907 F. Supp. 1012 (E.D. Tx 1995).
  - b. Most jurisdictions recognize a common law marriage if the parties at some time during their coverture lived in a state that allows the formation of common law marriages.
    - (1) The marriage becomes valid if the parties move to a state that allows common law marriages, even at some time after they begin living together in a state that does not allow the formation of such marriages.
    - (2) In such cases courts generally overlook the requirement of an express intent to marry.
  - c. Temporary visits to a state that allows formation of a common law marriage while the parties remain domiciled in a state that does not recognize common law marriage usually will not result in a valid marriage.

- (1) *Kelderhaus v. Kelderhaus*, 467 S.E.2d 303 (Ct. of App. Va 1996). Mrs. Kelderhaus filed for divorce and spousal support. Married in California in 1992 with a license (he was not legally divorced yet) moved to Arizona and got divorce from his first wife in Aug 1993. Immediately moved to Virginia and in 1994 filed for divorce in Virginia. Wife claims common-law marriage formed on way to Virginia in Oklahoma or Texas. Court finds no marriage and dismissed the case.

G. Marriage of military members.

1. Marriage in the U.S.

a. Counseling services available.

b. Legal advice.

(1) Capacity to marry.

(2) Ante-nuptial agreements.

c. Primary military interest: the validity of the marriage.

2. Marriage Overseas.

a. Military interests.

(1) Logistical burdens.

(2) Immigration problems.

(3) Welfare of the unsophisticated soldier.

- b. DOD policy: military regulations no longer require personnel desiring to marry overseas to apply for authorization from the chain of command.
  - (1) Although rescinded as a requirement, the goals of AR 608-61 are still relevant.
  - (2) Goals.
    - (a) Ensure the soldier understands the consequences and potential problems.
    - (b) Assist the soldier in obtaining a valid marriage under local law.
  - (3) Procedures required under old regulations should still be available.
    - (a) Premarital counseling.
      - (i) By commander.
      - (ii) By chaplain if desired.
      - (iii) By a Judge Advocate.
    - (a) Capacity to marry.
    - (b) Immigration issues.  
Admission to the U.S. is not automatic for an alien marrying a soldier.
  - (b) Physical exams.

- (c) Local background checks of proposed alien spouse to identify potential immigration problems.
- (d) Documents for marriage must be gathered.

#### **IV. SEPARATION AGREEMENTS**

A. A separation agreement is a written contract between a husband and wife who have decided to live apart from each other. Legal requirements include:

1. Valid marriage.
2. Capacity to contract.
3. Fact of separation or imminent separation.
4. Consideration.
5. Legal purpose.
6. Full disclosure of pertinent information between the parties.
7. Fair provision for the disadvantaged party.
8. Form.
  - a. Written
  - b. Oral

B. Types of Clauses:

1. “Boilerplate” recitals.

2. Dating clauses.
3. Securing promises.
4. Making promises non-modifiable.
5. Enforcement.

C. Substantive Clauses:

1. Property division.
2. Pension.
3. Alimony.
4. Debt division.
5. Custody and visitation.
6. Child support, college and child tax issues.
7. Tax clauses.

D. Separation Agreements using Quikscribe.

## V. ARMY FAMILY SUPPORT REQUIREMENTS: AR 608-99

A. Interim Support Only.

1. Army Regulation 608-99 creates an interim support requirement that applies **ONLY** when the parties do not have an agreement or a court order concerning support.

2. This interim amount is not intended to provide adequate support in all cases and should not be used as a guideline for civilian agencies or courts in establishing support requirements.

B. Family Members.

1. The Army support requirement applies only to family members.
  - a. Minor children (under 18) of the current marriage and of past marriages (including children adopted by the soldier).
  - b. Minor children born out of wedlock to:
    - (1) a female soldier.
    - (2) a male soldier **IF** paternity is established by court order **and** a support obligation is judicially established.
  - c. Any other person the soldier is obligated to support by applicable state law. For example, stepchildren are not considered family members unless state law requires soldier to support them.
  - d. Parents are not considered family members unless state law requires soldier to support them.
2. Note. Army Regulation 608-99 defines family members differently than other definitions of “dependents” or “family members” for purposes of identification cards and other military benefits.

C. Command Driven Program. The enforcement authority is the military commander.

D. The Support Obligation.



1. Soldiers must comply with any support order issued by a court of competent jurisdiction.
  2. Absent a court ordered support order, a soldier pays according to any written support agreement.
  3. Absent a written support agreement, a soldier pays according to AR 608-99 interim support requirement.
- E. The Interim Support Requirement. AR 608-99, para. 2-6.
1. Purpose. The purpose of interim support is to provide some family support while the parties seek an agreement or settlement by a court.
  2. Terms.
    - a. BAH II—WITH. The equivalent of the former BAQ—WITH. It is the BAH allowance for soldiers with dependents without consideration of the geographic duty location.
    - b. BAH II—WITHOUT. The equivalent of the former BAQ WITHOUT. It is the BAH allowance for soldiers without dependents and without consideration of the geographic duty location.
    - c. BAH II—DIFF. Representing the old BAQ differential.
    - d. PRO-RATA SHARE. BAH II —WITH divided by the total number of “family members” defined by AR 608-99.
  3. Single Family:
    - a. Family **living in government quarters**. Service member owes an amount equal to the BAH II—DIFF.

- b. Family **living off-post**. Service member owes an amount equal to the BAH II—WITH.
- c. Family members residing in **different locations**. Service member owes a PRO-RATA share to those family members not residing in government quarters and BAH II—DIFF to those family members residing in government quarters.

4. Military Couple:

- a. Neither spouse owes support to the other if the couple has no children.
- b. If the couple has children, and the children are all living with one spouse, the non-custodial spouse owes an amount equal to the BAH II—DIFF.
- c. If each spouse has at least one child living with them, then neither spouse owes support to the other.

5. Multiple Families:

- a. A soldier might have family members from different relationships and living at varying locations.
- b. A soldier in a multiple family situation must provide a pro-rata share of the BAH II—WITH.
- c. A soldier still must comply with all support orders.
- d. Remember that the location of family members determines how much support they receive.

F. Payment of Support. AR 608-99, para. 2-7.

1. Cash

- a. Personally delivered to an adult.
    - b. Receipt.
  2. Check
  3. Money Order
  4. Voluntary Allotment
  5. All payments are due first day of the month following the month to which the support payment pertains. (Payments for April due 1 May).
- G. Payment In-Kind. AR 608-99, para. 2-7d & e.
1. Generally payment in-kind is limited unless a written agreement or court order provides for payment in-kind.
  2. Limited to non-government housing expenses for a dwelling where the supported family members live. Examples:
    - a. Rent.
    - b. Real property taxes and property insurance, mortgages (if the supported family members reside in the house).
    - c. DOES NOT include utilities, cable television, or satellite dish.
  3. Soldier must make up any shortfall between payment in-kind and actual support obligation.
  4. Supported family member must give written consent to any other support in-kind such as car payments, insurance and credit card obligations.

H. Release From Support Requirements. AR 608-99, para. 2-11.

1. Only battalion commanders and above can release a soldier from support obligations. SJA must be consulted before releasing the soldier. AR 608-99, para. 2-10b (2)c.
2. Order issued by a court without jurisdiction. Release from the requirement to support in accordance with the terms of a court order is only appropriate when jurisdiction is clearly lacking and the soldier has continuously provided support in accordance with a written agreement or the interim requirements of AR 608-99.
3. A court order does not contain a financial support provision. There is a judicial proceeding underway and at least one court order issued but there is NO language of support addressed in the order(s). Release under this authority is limited and should be discussed with the servicing SJA office.
4. The income of the spouse exceeds the military pay of the soldier. Release from **spousal support**, not child support, and only applies in the absence of a court order or written separation agreement. The soldier must show the spouse makes more than the soldier's military pay (defined as military base pay only).
5. The soldier has been the victim of a substantiated case of physical abuse. The abuse must be documented by a court or a Family Advocacy Case Management Team (FACMT) and not involve a mutual affray or abuse of the spouse by the soldier. This exception authorizes release from regulatory requirements of **spousal support**, not child support.
6. The supported family member is in jail. This exception applies to any penal institution, regardless of the reason for incarceration.
7. The supported child is in the custody of another who is not the lawful custodian. This limited exception applies only when the soldier is the lawful custodian and is diligently pursuing physical custody.

- I. Sanctions for Non-Compliance.
  1. Administrative and Criminal.
  2. The decision to impose sanctions is entirely within the commander's discretion.

## VI. PATERNITY

- A. Support Obligations.
  1. Soldier mothers of children born out of wedlock are expected to provide support in accordance with court decrees or the interim support requirements.
  2. Soldier fathers of children born out of wedlock are not required to pay support **unless** there is a judicial determination of paternity **and** an order for support.
    - a. A signed voluntary acknowledgment of paternity done under a hospital-based f paternity acknowledgment has the force of a court order after 60 days with no further court action required.
    - b. The Welfare Reform Act authorizes expedited paternity and support hearings by administrative means with the full force of court order. SSCRA protections are not available in administrative hearings.
    - c. BAH II—DIFF.

- (1) A soldier otherwise not entitled to BAH, can receive BAH II—DIFF if the soldier contributes the full sum to support the child. The law limits the amount of entitlement to BAH II—DIFF regardless of the actual support ordered or paid. In order to draw even the BAH II—DIFF amount, the court order must compel the soldier to pay support in an amount equal to at least the soldier's BAH II—DIFF.
- (2) A soldier who draws BAH —WITHOUT based on the soldier's own off post residence can also receive the amount equal to the soldier's BAH II—DIFF for the support of the child.

B. The Role of the Command in Establishing Paternity.

1. Paternity is a civil matter.
2. A paternity claimant can make the allegation of paternity with the soldier's immediate commander. The commander will:
  - a. Advise the soldier of the allegation.
  - b. Provide an opportunity for the soldier to consult with an attorney.
  - c. Provide the soldier the opportunity to acknowledge or deny paternity.
  - d. Assist the soldier if paternity is admitted.
  - e. Advise the other party to pursue legal remedies if the soldier denies paternity or declines to comment.

## VII. DIVORCE

A. Jurisdiction.

1. Basic principle: court must have due process minimum contacts with one of the parties to exercise jurisdiction over the marriage.
2. Exercise of jurisdiction is based on specific statutory language, which addresses domicile or residency within the state for specified periods of time.
3. Most states have specific provisions allowing military personnel assigned within the state to maintain a divorce action if they meet period of residency requirements, regardless of domicile.
4. *In personam* jurisdiction over the “defendant” is not required to terminate the marriage, but such jurisdiction is necessary in matters of property division and spousal support.

B. Traditional Grounds for Marital Termination.

1. Fault Grounds.
  - a. Adultery.
  - b. Habitual drunkenness or drug addiction.
  - c. Abandonment or willful desertion.
  - d. Cruel or inhuman treatment or infliction of indignities.
  - e. Lengthy imprisonment or conviction of a felony.
  - f. Crimes against nature.
  - g. Commitment to a mental hospital.

C. No-Fault Revolution.

1. All states now have some type of no-fault termination.

- a. Pure No-Fault. Seventeen states: AZ, CA, CO, DE, D.C., FL, HI, IA, KY, MI, MN, MT, NB, OR, WA, WI, WY.
  - b. Hybrid No-Fault. Most states added a no-fault provision to their statutes.
- 2. General requirements to establish a no-fault cause of action.
  - a. Minimum requirement is that one party asks for a divorce.
  - b. Most states add a condition that the parties live separate and apart for a period of time varying from six months to two years.
  - c. Some states also require that the parties enter into a separation agreement in order to proceed on a no-fault basis.

## **VIII. ANNULMENTS**

- A. Annulment vs. Divorce.
  - 1. Annulment. The marriage never existed, so marital property and marital obligations (such as alimony) do not exist.
  - 2. Divorce. The termination of a marriage, but the parties may have continuing obligations to each other.
- B. Grounds for Annulment.
  - 1. The grounds for annulment must have existed at the time of the marriage.
  - 2. Polygamy: formal annulment usually not necessary since this defect usually renders the marriage void.



3. Incestuous marriage: in most jurisdictions this type of marriage is void.
4. Age: an underage party to a marriage can have the marriage annulled, at least until reaching majority, and the defect in some jurisdictions can result in a void marriage.
5. Impotence: usually must render the party physically incapable of normal sexual relations and must be incurable.
6. Disease: usually venereal disease.
7. Duress: must be sufficient to overcome the contractual notion of consent—usually must amount to violence or threats of violence that led to consent to marriage.
8. Mental incapacity: feeble-mindedness, insanity, lunacy, idiocy, or mental weakness creating incapacity to contract.
9. Fraud.
  - a. Generally must relate to some aspect of the marital relationship and must be material. If the marriage has been consummated, a higher standard may be applied.
  - b. Concealment of pregnancy by another man is sufficient.
  - c. Misrepresentation that the husband is the father of the unborn child is usually enough.
  - d. False assertion of pregnancy is not a ground for annulment.
10. Marriage for limited purposes: may result in a voidable marriage.
11. Refusal to conceive children.

- a. Implied purpose of marriage is to procreate, absent agreement otherwise.
  - b. If a party never intended to have children (and if this can be proven), this constitutes fraud sufficient to justify annulment.
  - c. However, the "victim" spouse may be held to have waived the issue by continued cohabitation.
- C. Denial of conjugal rights is not a ground for annulment in itself, but may constitute fraud if the party never intended to have sexual relations.

## **IX. UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT (USFSPA)**

- A. 10 U.S.C. § 1408 (2000).
- B. Congress enacted the USFSPA in 1982 to offer some financial protection to certain former spouses of service members. It allows states to divide military disposable retired pay as marital property upon divorce. It allows DFAS (Defense Finance and Accounting Service) to directly pay some former spouses (through a court order) and to obtain medical care and certain other benefits.

## **X. UNIFORM INTERSTATE FAMILY SUPPORT ACT (UIFSA)**

- A. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. Law 104-193, 110 Stat. 2105) signed by President Clinton on 22 August 1996 amended the Social Security Act to include a provision requiring states to adopt UIFSA by 1 January 1998. 42 U.S.C. §666 (f).
- B. Prior to 1950, a US parent who wanted to ensure support against the other parent who lived in another US state had to travel to the support debtor's state to take legal action.

- C. Since 1950, a uniform act has existed that allowed for those states that subscribed to it, to enforce each other's support orders. The 1950 act, prepared under the auspices of the National Conference of Commissioners on Uniform State Laws, was called "URESА", short for Uniform Reciprocal Enforcement of Support Act.
- D. In 1968, URESА was amended and the new act was called "RURESА," short for Revised Uniform Reciprocal Enforcement of Support Act. By 1992, all US states had enacted RURESА or URESА. Even American Samoa, Puerto Rico, Guam and the Virgin Islands had adopted a version of either URESА or RURESА.
- E. UIFSA. The first state to impose a support order retains "continuing exclusive jurisdiction" as long as one of the parties continues to reside in that state or if both parties agree to transfer jurisdiction to another state. Until one of those events occurs, only the state that authorized the original support order can modify the award. In this way, all parties, courts and enforcement officials are assured that, between UIFSA states, there can only be one support order in effect at any given time.

## **XI. SERVICE OF PROCESS**

- A. CONUS.
  - 1. AR 27-40, Litigation.
  - 2. Military Role.
  - 3. What is the jurisdiction of the installation?
    - a. Exclusive federal jurisdiction.
    - b. Concurrent.
    - c. Proprietary.
- B. OCONUS.

1. The Hague Service Convention.
  - a. Purpose. Provide a mechanism to help plaintiff authorized to serve documents under the laws of its country effect service that gives appropriate notice to the party being served and is not objectionable to the country in which that party is served. *See* Comm. on Fed. Courts of the N.Y. State Bar Ass'n, *Service of Process Abroad: A Nuts and Bolts Guide*, 122 F.R.F. 63, 70 (1989), Dept. of Justice, U.S. Marshals Service, Policy & Procedures, Vol.III, Process, pgs. 7-43, 48,57 (Nov. 1994).
  - b. Central Authority. Each nation / party to the treaty must establish one to process letters of request for service. These letters must comply with the provisions of the convention. Arts. 2-7, 13.
  - c. Direct, Noncompulsory Service Through Diplomatic Agents. Permitted in every case with respect to U.S. nationals. With respect to others, permitted unless the foreign country has objected to such method. Art. 8.
  - d. Mail. A person may "send" judicial documents by mail directly to persons abroad, unless the country of destination has objected to direct mailing. Art. 10(a). *See, e.g., Rivers v. Stihl, Inc.*, 434 So. 2d 766 (Ala. 1983) (holding that service by mail in Germany is ineffective because of Germany's objection).
  - e. Delivery of a Translated Document by Central Authority. Generally a safe (albeit expensive) method. Unless the plaintiff applying for service within a foreign country specifically requests some other method, "the document may always be served by delivery to an addressee who accepts it voluntarily." Art. 5. "The Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed."

- f. Mandatory Use of the Convention. Compliance with the Convention is mandatory in all cases in which it applies. *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 94 (1988). Yet ultimately the question whether service abroad is adequate must be determined by reference to the law of the forum state. See, e.g., *Vause v. Vause*, 140 Wis. 2d 157 (1987) (rejecting mother's claim that service of process by Airman-father in custody case was required to be in manner prescribed by the Convention).
  - g. Bilateral Agreements. *Richmark Corp. V. Timber Falling Consultants, Inc.*, 937 F.2d 1444, cert. denied, 506 U.S. 903 (1992).
2. Service in Non-Convention Countries.
- a. Action Brought in U.S. Federal Court. Governed by Fed. R.Civ.P. 4(e) and 4(i). Majority view among American courts? Federal and state procedures are the sole requirements that extraterritorial U.S. service must satisfy. Defective service under foreign law usually will not invalidate service for purposes of U.S. law.
  - b. Action Brought in State Court. Governed by state rules for service of process.
  - c. Caveat. Usually, plaintiff should make every effort to comply with the internal law of the foreign country. See, e.g., *R.M.B. Electrostat, Inc. v. Lectra Trading, A.G.*, No. 82-1844 (E.D.Pa. Jan. 17, 1983) (dismissing plaintiff's complaint where service had been by mail upon defendant's office in Switzerland and where the federal law itself required service of translated summons and complaint by letters rogatory).
  - d. Letters Rogatory. A request for assistance from the court of one country to the court of another country. Courts honor such requests as a matter of comity. Fed.Rule of Civil Proc.4(i)(1)(B) and some state statutes make specific provisions for use of letters rogatory. 1 B. Ristau, INTERNATIONAL JUDICIAL ASSISTANCE ~3-1 to 3-47 (1984 & Supp.1986).

3. Bilateral Agreements. Service by receiving state courts of foreign documents on sending state personnel may be achievable through a sending state liaison office pursuant to a status of forces agreement. *See, e.g.*, Supplementary Agreement to the NATO Status of Forces Agreement With Respect to Forces Stationed in the Federal Republic of Germany, Aug. 3, 1959, U.S.-F.R.G., art. 32, 1 U.S.T. 531 [hereinafter NATO Supp. Agreement] (entered into force for United States on Jul. 1, 1963).

## **XII. NOTARY AND POWERS OF ATTORNEY**

### **A. Authority of U.S. Military Personnel to Administer Oaths and Perform Notarial Acts.**

1. 10 U.S.C. § 1044a grants named individuals the general powers of a notary public and of a consul of the United States.
2. 10 U.S.C. § 1044b is intended to increase the acceptability of general and special powers of attorney prepared by legal assistance attorneys for their clients.
3. 10 U.S.C. § 1044c is intended to increase the acceptability of advanced medical directives prepared by legal assistance attorneys for their clients.
4. 10 U.S.C. § 936 grants named individuals power to administer oaths necessary for military administration (to include military justice) and necessary in the performance of their duties.

### **B. Powers of Attorney (POA).**

1. Definition.
  - a. A written instrument executed by one person, the principal,
  - b. Designating another individual, the agent or "attorney-in-fact."

- c. To perform specified acts on the principal's behalf.
- 2. Purpose.
  - a. To notify third parties of the agent's authority.
  - b. Powers of attorney are usually designated as either "special" or "general" depending on the specified act(s) or kind(s) of act(s) for which authority to act on behalf of the principal has been given.
- 3. Types of Powers of Attorney.
  - a. General POA. General POAs giving broad powers and authority to the attorney-in-fact can be dangerous instruments in the hands of persons inexperienced in business matters, persons of unstable temperament, or anyone in whom the grantor does not have the utmost trust and confidence.
  - b. Special POA. To reduce the risks associated with granting broad general powers and authorities, a special POA should be used whenever it can fulfill the needs of the client. The power or authority given under a special POA is limited to the specific act or acts described in the instrument.

### **XIII. CONCLUSION**

“Marriage is a great institution, but I'm not ready for an institution yet.”

— Mae West

## CHAPTER F

### DOD CHILD SUPPORT POLICY AND AR 608-99

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# **DOD CHILD SUPPORT POLICY AND AR 608-99**

## ***OUTLINE OF INSTRUCTION***

### **I. INTRODUCTION**

- A. Department of Defense (DOD) Policy: Service members will not use military service to evade family support obligations.
- B. Each service implements the DOD Policy through its respective departmental regulations.

### **II. REFERENCES & WEBSITES**

- A. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act), Pub. L. No. 104-193, 110 Stat. 2105 (1996).
- B. Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408 (2000).
- C. 42 U.S.C. §§ 659-663 (2000) (Garnishment), 5 C.F.R. pt. 581, Processing Garnishment Orders for Child Support and/or Alimony (2001).
- D. 15 U.S.C. § 1673 (2000) (Restriction on Garnishment).
- E. 42 U.S.C. § 665 (2000) (Allotments), 32 C.F.R. pt. 54, Allotments for Child and Spousal Support.
- F. U.S. DEP'T OF DEFENSE, DIR. 5525.9, COMPLIANCE OF DOD MEMBERS, EMPLOYEES, AND FAMILY MEMBERS OUTSIDE THE UNITED STATES WITH COURT ORDERS (17 Aug. 1990) [hereinafter DOD DIR. 5525.9].
- G. U.S. DEP'T OF DEFENSE FINANCIAL MANAGEMENT REG. vol. 7, pt. A, ch. 26, (Basic Allowance for Housing) (BAH) (Sept. 2000) [hereinafter DOD FMR vol. 7A, ch. 26].

- H. U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (1 Nov. 1994) [hereinafter AR 608-99].
- I. U.S. DEP'T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL art. 1754-030 (Support of Family Members), art. 5800-10 (Paternity Complaints) (18 May 2001) [hereinafter MILPERSMAN].
- J. U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2906, PERSONAL FINANCIAL RESPONSIBILITY (1 Jan. 1998) [hereinafter SECAF INST. 36-2906]
- K. U.S. MARINE CORPS, ORDER P5800.16A MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION, ch. 15, (Dependent Support and Paternity) (31 Aug. 1999) [hereinafter LEGADMINMAN].
- L. U.S. DEP'T OF TRANSPORTATION, U.S. COAST GUARD COMMANDANT INSTR. M1000.6A, ch. 8M (Supporting Dependents) (3 May 2001) [hereinafter COMDTINST M1000.6A].
- M. Defense Finance and Accounting Service (DFAS) Website:  
<http://www.dfas.mil/index.htm>
- N. ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U. S. ARMY, JA 263, FAMILY LAW GUIDE (May 1998).

### **III. OTHER SERVICES' SUPPORT REQUIREMENTS.**

- A. The Air Force Policy. SECAF INST. 36-2906.
  - 1. CFR: Effective 1 January 2001 the Air Force removed its rule pertaining to Personal Financial Responsibility because it no longer reflected the current policy contained in AFI 36-2906.
  - 2. Overall Financial Responsibility Policy: The Air force will advise its members and the complainants that "the Air Force has no authority to arbitrate disputed cases of nonsupport or personal indebtedness." AFI para. 3.1.2.

3. Policy toward nonsupport of Family members: The Air Force will advise its members that they are expected to provide **adequate financial support to family members**. AFI para 3.2.1
4. Termination of Basic Allowance for Housing (BAH): If a member receives BAH at the with-dependents rate based on dependents for whom the member refuses to support, then the Air Force will terminate the BAH entitlement and recoup the BAH with-dependent rate for the periods of non-support. AFI para. 3.2.3
5. Paternity: The Air Force does not adjudicate paternity claims. If a member admits paternity, then the Air Force will advise the member of their financial support obligations. AFI para. 3.3

B. The Marine Corps Policy. LEGALADMINMAN, ch. 15

1. Support Standards: § 15002.1
  - a. Single Family: §15002.2
    - (1) SINGLE FAMILY IN GOVERNMENT HOUSING: Support will be \$200.00 per supported person up to a maximum of 1/3 gross pay, per month.
    - (2) SINGLE FAMILY NOT IN GOVERNMENT HOUSING: Support will be either \$200 per supported family member, or BAH at the “with dependents” rate, whichever is greater up to a maximum of 1/3 gross pay, per month.
  - b. Multiple Families: § 15002.3
    - (1) Support for each family member shall be either \$200 per supported family member, or the pro-rata share of BAH at the “with dependents” rate, whichever is greater up to a maximum of 1/3 gross pay, per month.

(2) Military spouses are not included.

c. Both Spouses in the Armed Forces: § 15002.4

(1) NO CHILDREN OF THE MARRIAGE: No support obligation regardless of pay grade disparities.

(2) ALL CHILDREN OF THE MARRIAGE IN CUSTODY OF ONE SPOUSE: Support shall be either \$200 per supported child, or BAH at the “with dependent” rate, whichever is greater up to a maximum of 1/3 gross pay, per month.

(3) SPLIT CUSTODY: Support shall be \$200 per supported family member, or the pro rata share of BAH at the “with dependents” rate, whichever is greater, up to a maximum of 1/3 gross pay.

d. Gross pay includes basic pay and BAH but does not include basic allowance for subsistence (BAS), hazardous duty pay, sea or foreign duty pay, or incentive pay.

2. Punitive Regulation: § 15001.7-9

a. Marines who fail to comply with any of the three requirements below violate a punitive lawful general order:

(1) A financial support order.

(2) A related provision of a court order.

(3) The interim support obligations of the regulation.

b. Commanders are encouraged to sparingly resort to UCMJ.

3. In-kind Payments: §15002.6b
  - a. In-kind payment is authorized.
  - b. In-kind payment not limited to non-governmental housing costs and may include charge accounts, car payments, etc.
  - c. Commander must authorize the in-kind payment as complying with the regulation requirements.
4. Release and Waiver of Support: §§ 15003.5 and 15004.4-6
  - a. A commanding officer can **release** a marine under his or her command from the support requirements under four circumstances:
    - (1) Marine cannot determine the whereabouts and welfare of the child concerned.
    - (2) Person requesting support for the child does not have physical custody of the child.
    - (3) Marine has been the victim of a substantiated physical abuse by the spouse requesting support (only releases spousal support, not child support).
    - (4) The dependent is in jail.
  - b. A commanding officer can request the General Court Martial Authority (GCMA) to **waive** the support for a spouse (not child) under the following two circumstances:
    - (1) Desertion by the spouse without cause.
    - (2) Infidelity on the part of the spouse.
    - (3) Standard of Proof: Preponderance of Evidence

5. Paternity: § 1505

- a. Civil Matter. Marine commanders do not make paternity determinations.
- b. If a Marine acknowledges paternity or a court adjudicates him the father of an illegitimate child, the Marine owes an obligation of support under the regulation.

C. The Navy Policy: MILPERSMAN arts. 1754-030 and 5800-10 (paternity)

- 1. Policy: The Navy will not act as a haven for personnel who disregard or evade obligations to their legal family member.
- 2. Type of Support: In the absence of an agreement or a court order, the following may be used as a guide:
  - a. Spouse only: 1/3 of gross pay.
  - b. Spouse and one minor child: 1/2 of gross pay.
  - c. Spouse and two or more children: 3/5 of gross pay.
  - d. Spouse and four or more children: >3/5 of gross pay.
  - e. One minor child (no spousal support): 1/6 of gross pay.
  - f. Two minor children (no spousal support): 1/4 of gross pay.
  - g. Three minor children (no spousal support): 1/3 of gross pay.
  - h. Gross Pay. Gross pay includes basic pay and BAH but does not include basic allowance for subsistence (BAS), hazardous duty pay, sea or foreign duty pay, or incentive pay

3. Waiver of Spousal Support: A member can request a waiver of spousal (but not child) support based on desertion without cause, physical abuse, or for infidelity on the part of the spouse.
  - a. The request for waiver must be submitted to the Director, Navy Family Allowance Activity.
  - b. The request must have a complete statement of facts, commander recommendation, and substantiating evidence.
4. Paternity. The Navy does not decide paternity. The Navy will advise members of their financial, legal, and moral obligations to support a child when a United States or foreign court of competent jurisdiction renders an order or decree specifying support of a child.

D. The Coast Guard Policy: COMDTINST M1000.6A, ch. 8M

1. Policy: The Coast Guard, like the Navy, will not be a haven or refuge for personnel who disregard or evade their obligations to support their families. Members are expected to provide adequate and continuous support for lawful dependents, and to comply with the terms of support clauses in separation agreements and court orders.
  - a. If, after counseling, the member demonstrates a pattern of non-support and/or failure to obey civil court support orders, the member is subject to administrative discharge for unfitness.
  - b. Non-support that is "notorious" and discrediting to the Coast Guard can result in courts-martial or other disciplinary proceedings.
2. Court Orders. Court orders for support are normally binding on members. If, however, a "member acting on good faith and on the express advice of qualified legal counsel disputes such a claim, the commanding officer may withhold disciplinary /administrative action against the member for a reasonable length of time . . ."

3. Support Scale:

- a. Spouse only: BAH difference plus 20% of basic pay.
- b. Spouse and one minor child: BAH difference plus 25% of basic pay.
- c. Spouse and two or more minor children: BAH difference plus 30% of basic pay.
- d. One minor child: 16.7% (1/6) of basic pay.
- e. Two minor children: 25% (1/4) of basic pay.
- f. Three or more minor children: 33% (1/3) of basic pay.

4. Defenses. Defenses to non-support (Coast Guard guidelines):

- a. Spousal non-support: infidelity or desertion.
- b. Child non-support:
  - (1) Member cannot ascertain the whereabouts and welfare of the child.
  - (2) Person seeking payment does not have physical custody of the child.

5. Paternity. A civil matter.

#### **IV. ARMY SUPPORT REQUIREMENTS: AR 608-99**

A. Applicability.



1. All members of the Active Army including cadets at the U.S. Military Academy.
  2. All members of the U.S. Army Reserve on active duty pursuant to orders for more than twenty-nine days.
  3. All members of the Army National Guard on active duty pursuant to orders (under Title 10 U.S. Code) for more than twenty-nine days.
- B. Family Members.
1. The Army support requirement applies only to family members.
  2. Army Regulation 608-99 defines family members differently than other definitions of dependents or family members used for benefits such as identification cards and post exchange/medical privileges.
- C. Interim Support Only.
1. Army Regulation 608-99 creates an interim support requirement that applies **ONLY** when the parties do not have an agreement or a court order concerning support.
  2. This interim amount is not intended to provide adequate support in all cases and should not be used as a guideline for civilian agencies or courts in establishing support requirements.
- D. Not a Garnishment Authority.
1. AR 608-99 does not authorize the Army to take money from a soldier and pay it to family members.
  2. Instead, it creates a military obligation to pay support.
- E. Command Driven Program.

1. The enforcement authority is the military commander.
  2. The commander can punish a soldier for failing to comply with the obligations imposed by the regulation because AR 608-99 is a punitive regulation.
- F. Basic Allowance for Housing II (BAH II). The Army uses BAH II as a **yardstick** for determining the amount of the interim support obligation.
1. The old entitlement: Basic Allowance for Quarters (BAQ). The Army used to pay an entitlement to service members for off-post housing. The amount of money was based on rank and whether the service member had dependents. This rate was the same for each grade regardless of duty location. In order to compensate for differing costs of living, the Army also paid a Variable Housing Allowance (VHA) depending on duty location. These two entitlements are now combined (as of 1 Jan 98) into The Basic Allowance for Housing (BAH).
  2. BAH and BAH II. Since the new BAH combines the former BAQ and VHA allowances into one lump sum, service members of the same rank are paid differently based on duty location. In order to extract out a constant figure from the BAH, one must use the BAH II Table to determine that portion of the BAH representing the old BAQ figure. See Appendix A.
  3. **Practice Note 1.** The term BAQ is used AR 608-99 (1994). A new AR 608-99 is forthcoming and will incorporate the new terminology. Until then, every time you read BAQ, think BAH II.
  4. **Practice Note 2.** Actual receipt of BAH is **not** a prerequisite to the obligation to pay interim support to family members. Remember the BAH II is simply a yardstick to arrive at an amount.
  5. **Practice Note 3.** BAH II is **not** a cap on support obligation of a soldier. The Army regulation merely sets minimum interim support requirements. A service member can pay more voluntarily or if there are other court orders, they are added .
- G. Family Members. Who are they?

1. Current spouse.
2. Minor children (under 18) of the current marriage and of past marriages (including children adopted by the soldier).
3. Minor children born out of wedlock to:
  - a. a female soldier.
  - b. a male soldier **IF** paternity is established by court order **and** a support obligation is judicially established.
4. Any other person the soldier is obligated to support by applicable state law.
  - a. Stepchildren are not considered family members unless state law requires soldier to support them.
  - b. Parents are not considered family members unless state law requires soldier to support them.

#### H. Hierarchy of Support.

1. Soldiers must comply with any support order issued by a court of competent jurisdiction.
2. What about a Foreign Court Order? AR 608-99, para. 2-4 b:
  - a. A commander cannot order a soldier to comply with a foreign court order of support **UNLESS**:
    - (1) a U.S. state court domesticates the foreign court order OR

(2) a treaty or international agreement requires the United States to honor the foreign court order. The United States has such an agreement with Germany ONLY WHILE THE SOLDIER IS STATIONED IN GERMANY.

b. Once a soldier leaves the foreign country, a commander lacks authority to compel compliance with a foreign court order. However, a soldier might still be subject to the obligation of foreign court order if the soldier either returns to the foreign country or the supported family member domesticates the foreign order in a U.S. Court.

c. **Practice Note 4.** A soldier still must comply with the interim support requirements of AR 608-99 even if the commander cannot enforce the foreign court order.

3. Absent a court ordered support order, a soldier pays according to any written support agreement.

4. Absent a written support agreement, a soldier pays according to AR 608-99 interim support requirement.

I. The Interim Support Requirement. AR 608-99, para. 2-6.

1. Purpose. The purpose of interim support is to provide some family support while the parties seek an agreement or settlement by a court.

2. Terminology.

a. BAH II WITH. BAH II WITH is the equivalent of the former BAQ WITH. It is the BAH for soldiers with dependents without consideration of the geographic duty location.

b. BAH II WITHOUT. BAH II WITHOUT is the equivalent of the former BAQ WITHOUT. It is the BAH for soldiers without dependents and without consideration of the geographic duty location.

- c. BAH II DIFF. BAH II DIFF is the old BAQ differential closely representing the difference between BAH II WITH and BAH II WITHOUT.
- d. PRO-RATA SHARE. PRO-RATA is the BAH II WITH divided by the total number of “family members” defined by AR 608-99.

3. Rules for a Single Family:

- a. All family members **living in government quarters:** BAH II DIFF.

(1) **Hypothetical 1:** CPT Leaving moved out of his on-post quarters after deciding to divorce his civilian wife. They do not have children. Mrs. Leaving obtained permission to live in the quarters for an additional six months without charge. What is CPT Leaving’s interim support requirement if any?

(2) **Analysis 1:**

- b. All family members **living off-post:** BAH-II-WITH

(1) **Hypothetical 2:** MAJ Major moved out of her off-post rental house after deciding to divorce her civilian husband, Mr. Major. They have three children who all remained with Mr. Major in the rental house. What is MAJ Major’s interim support requirement?

(2) **Analysis 2:**

- c. Family members residing in **different locations**: PRO-RATA share to those not in government quarters and BAH II DIFF for members residing in government quarters.

- (1) **Hypothetical 3:** CPT Moneymaker and her husband have four children and live on-post in government quarters. Mr. Moneymaker moves out to an apartment after the couple decides to separate with a view toward divorce. What is CPT Moneymaker's interim support requirement, if any?

- (2) **Analysis 3:**

- 4. Rules for Military Couple:

- a. Neither spouse owes support to the other if they do not have children.

- (1) **Hypothetical 4:** SFC Culpepper and SSG Culpepper were assigned to two separate duty locations. The Army sent SFC Culpepper language training in California and SSG Culpepper to Korea for a year. What are the respective support requirements if they do not have children?

- (2) **Analysis 4:**

- b. If a military couple has children, and the children are all living with one spouse, the non-custodial spouse owes BAH II DIFF.
  - (1) **Hypothetical 5:** What if the Culpepper's have two children and the kids will both reside with SFC Culpepper in California? Does SSG Culpepper owe support?
  - (2) **Analysis 5:**
  
- c. If at least one child resides with each spouse, neither spouse owes support to the other.
  - (1) **Hypothetical 6:** What if one child goes to Korea with SSG Culpepper and the other child goes to California with SFC Culpepper?
  - (2) **Analysis 6:**

5. Rules for Multiple Families:

- a. A soldier might have family members from different relationships and living at varying locations. A soldier in a multiple family situation must provide a pro-rata share of the BAH II WITH to all family members not in government quarters. Those family members in government quarters receive BAH II DIFF as a group.

(1) **Hypothetical 7:** SSG Thomas (E-6) has two children by a previous marriage with no court ordered support. He just separated from his current family of a wife and one child who reside off post. What is SSG Thomas' support requirement?

(2) **Analysis 7:**

b. Remember that the location of family members determines how much interim support the service member owes.

(1) **Hypothetical 8:** Same facts as #7, but suppose his two children from his prior marriage live with their mother and step-father, SSG Newguy, in government quarters. What is SSG Thomas' support requirement?

(2) **Analysis 8:**

c. A service member must still comply with any valid existing court orders.



(1) **Hypothetical 9:** Same as #8, but now you learn that SSG has a valid court order requiring him to pay \$150 per month per child for each of the two children of the previous marriage. What is SSG Thomas' support requirement?

(2) **Analysis 9:**

d. A service member must comply with all court orders, not just ones pertaining to child support.

(1) **Hypothetical 10:** Same facts as #9 except you just found a clause in the court order requiring SSG Thomas to \$100 per month in alimony to his ex-wife.

(2) **Analysis 10**

6. When the Interim Requirement Is Not Enough.

a. Soldiers and supported family members who believe the interim requirement is not enough or excessive must obtain a court order or enter an agreement to change the support obligation of the soldier.

- b. The commander has **NO** authority to order support less than or in excess of the interim requirement amount found in AR 608-99.

J. Payment of Support. AR 608-99, para. 2-7.

- 1. Cash.
  - a. Personally delivered to an adult.
  - b. Receipt.
- 2. Check.
- 3. Money Order.
- 4. Voluntary Allotment.
- 5. All payments are due first day of the month following the month to which the support payment pertains. (Payments for April due 1 May).

K. Payment In-Kind. AR 608-99, para. 2-7d & e.

- 1. Generally payment in-kind is limited unless a written agreement or court order provides for payment in-kind.
- 2. Limited to non-government housing expenses for a dwelling where the supported family members live (provided soldier has legal responsibility by reason of contract, lease, or loan agreement).  
Examples:
  - a. Rent.
  - b. Real property taxes and property insurance, mortgages (if the supported family members reside in the house).

- c. DOES NOT include utilities, cable television, or satellite dish.
  - 3. Soldier must make up any shortfall between payment in-kind and actual support obligation.
  - 4. Supported family member must give written consent to any other support in-kind such as car payments, insurance and credit card obligations.
- L. Release From Support Requirements. AR 608-99, para. 2-11.
- 1. Authority to release. Only battalion commanders and above **may release** a soldier from support obligations. SJA must be consulted before releasing the soldier. AR 608-99, para. 2-10b (2)c.
  - 2. Order issued by a court without jurisdiction. Release from the requirement to support in accordance with the terms of a court order is only appropriate when jurisdiction is clearly lacking and the soldier has continuously provided support in accordance with a written agreement or the interim requirements of AR 608-99.
  - 3. A court order does not contain a financial support provision. There is a judicial proceeding underway and at least one court order issued but there is NO language of support addressed in the order(s). Release under this authority is limited and should be discussed with the servicing SJA office.
  - 4. The income of the spouse exceeds the military pay of the soldier. Release from **spousal support**, not child support, and only applies in the absence of a court order or written separation agreement. The soldier must show the spouse makes more than the soldier's military pay (defined as military base pay only).
  - 5. The soldier has been the victim of a substantiated case of physical abuse. The abuse must be documented by a court or a Family Advocacy Case Management Team (FACMT) and not involve a mutual affray or abuse of the spouse by the soldier. This exception authorizes release from regulatory requirements of **spousal support**, not child support.

6. The supported family member is in jail. This exception applies to any penal institution, regardless of the reason for incarceration.
7. The supported child is in the custody of another who is not the lawful custodian. This limited exception applies only when the soldier is the lawful custodian and is diligently pursuing physical custody.

M. Raising the Issue of Non-Support.

1. Communicating with the non-supporting soldier is the initial option. If it is obvious that the nonpayment of support is intentional, or if there is no satisfactory response from the soldier, write to the soldier's immediate (i.e., unit) commander.
2. The commander is required to counsel the soldier, ascertain his/her intentions re: support, and respond to the writer. The commander may also impose sanctions for non-support.

N. Sanctions for Non-Compliance.

1. Administrative:
  - a. Reprimand.
  - b. Adverse information in official file.
  - c. Bar to Reenlistment.
  - d. Administrative Elimination.
2. Punitive: AR 608-99 paragraphs 2-6 and 2-9 are punitive
  - a. Article 15.
  - b. Courts-Martial.

- (1) *United States v. Birdsong*, 40 M.J. 606 (1994)  
(holding that the military judge erred in not instructing the members on the “claim of right” defense as to the larceny of SGT Walker’s BAQ at the with-dependent rate).
- (2) *United States v. Anderson*, 37 M.J. 953 (1993)  
(holding that Sergeant Anderson violated Art. 92, UCMJ by failing to provide family and child support to his estranged wife and children).
- (3) *United States v. Brunson*, 30 M.J. 766 (1990)  
(holding that Captain Brunson did not violate AR 608-99 by failing to support his family members because he and his wife agreed to support arrangements other than provided in the court order as part of their reconciliation)

3. The decision to impose sanctions is entirely within the commander's discretion.

O. BAH Recoupment. Generally, a soldier receiving allowances premised on supporting dependents, must do so. Failure to actually pay it can lead to recoupment at best and criminal charges based on fraud at worst.

## **V. ARMY PATERNITY POLICY: AR 608-99.**

A. Support Obligations.

1. Soldier Mothers. Soldier mothers of children born out of wedlock are expected to provide support in accordance with court decrees or the interim support requirements.

2. Soldier Fathers. Soldier fathers of children born out of wedlock are not required to pay support **unless** there is a judicial determination of paternity **and** an order for support.
  - a. A signed voluntary acknowledgment of paternity done under a hospital-based f paternity acknowledgment has the force of a court order after sixty days with no further court action required.
  - b. The Welfare Reform Act authorizes expedited paternity and support hearings by administrative means with the full force of court order.
  - c. **Practice Note 5.** The Soldiers' and Sailors Civil Relief Act (SSCRA) protections are not available in administrative hearings.
3. BAH II DIFF.
  - a. A soldier otherwise not entitled to BAH, can receive BAH II-DIFF if the soldier contributes the full sum to support the child. The law limits the amount of entitlement to BAH II-DIFF regardless of the actual support ordered or paid. In order to draw even the BAH II-DIFF amount, the court order must compel the soldier to pay support in an amount equal to at least the soldier's BAH II-DIFF.
  - b. A soldier who draws BAH WITHOUT based on the soldier's own off post residence can also receive the amount equal to the soldier's BAH-II-DIFF for the support of the child.
  - c. **Practice Note 6.** Your client must take a certified copy of the court order to the finance office and fill out a change in BAH form to start the BAH II DIFF entitlement.

B. The Role of the Command in Establishing Paternity.

1. Civil Matter. Paternity is a civil matter. The Army will not adjudicate the issue of paternity.

2. Command Response. A paternity claimant can make the allegation of paternity with the soldier's immediate commander. The commander will:
  - a. Advise the soldier of the allegation.
  - b. Provide an opportunity for the soldier to consult with an attorney.
  - c. Provide the soldier the opportunity to acknowledge or deny paternity.
  - d. Assist the soldier if paternity is admitted.
  - e. Advise the other party to pursue legal remedies if the soldier denies paternity or declines to comment.

## **VI. PARENTAL KIDNAPPING.**

### **A. Army Policy.**

1. Compliance. Soldiers will comply with court orders regarding child custody.
2. Assistance. The Army will assist the custodial parent regain custody.
  - a. Provide information regarding the soldier's current and future duty assignment.
  - b. Take appropriate disciplinary action against soldiers who violate custody decrees.

### **B. Legal Obligations: AR 608-99, para. 2-9.**

1. No kidnapping. Soldiers will not knowingly abduct, entice, or take a child from a lawful custodian.
2. No harboring. Soldiers will not knowingly withhold, detain, or conceal a child from a lawful custodian.
3. Definition of child. A child is a relative of the soldier who is unmarried and under 14.
4. Definition of lawful custodian. A lawful custodian is a person to whom a court order grants custody of a child.
5. Defense. A valid court order granting sole physical custody to the soldier is a defense to this provision.

## **VII. REQUESTS FOR ASSISTANCE FROM GOVERNMENT OFFICIALS BASED ON COURT ORDERS.**

- A. Army Policy. AR 608-99, ch. 4 implements DOD DIR. 5525.9
- B. Application.
  1. Outside United States. Applies to soldiers and family members living outside the U.S.
  2. Family Members. Does not apply to DOD or DA civilian employees who are not also family members.
  3. Official Requests. Applies to requests for assistance by U.S. Federal, State or local government officials based on court orders regarding financial support, child custody, visitation, paternity and related cases.
- C. Procedure to Request Assistance.



1. Request. Federal, State or local government official sends a letter requesting assistance by the Army regarding a soldier or family member living outside the U.S.
2. Basis for the request.
  - a. Charged or convicted of a felony arising from financial support, child custody, visitation, paternity or a related case.
  - b. Held in contempt by a court for failing to obey an order or been ordered to show cause why he should not be held in contempt arising from a case of financial support, child custody, visitation, paternity or a related case.
3. Articulate Requested Assistance.
  - a. The request must ask for some sort of assistance by the Army regarding the soldier or family member.
  - b. The assistance requested need not be realistic, warranted or possible to trigger some response under AR 608-99, Ch. 4.
4. Response Required.
  - a. Commanders with “close consultation with their servicing SJA” will allow the subject of the request an opportunity to show legitimate cause for noncompliance with the order.
  - b. Commanders will attempt to resolve the matter without the return of the soldier or family member.

- c. If the Commander and court cannot resolve the issue without the return of the soldier or family member the following will occur **if subject of the request is a soldier**:
- (1) Underlying charge, conviction, contempt or order to show cause involves removal of a child from the jurisdiction of a court or the custody of the lawful custodian:
    - (a) Company Commander will order the soldier to return to an appropriate port of entry at Government expense, contingent on the party requesting assistance providing transportation (and escort if desired) of the soldier to the jurisdiction of the court.
    - (b) Ordinarily the commander will give ten days notice to the requesting government official.
    - (c) Military escort to the port of debarkation is appropriate if escort to the jurisdiction is provided by the requesting official.
    - (d) Company Commander must promptly report action under this regulation through command channels to the GCMCA.
  - (2) Underlying charge, conviction, contempt or order to show cause does not involve removal of a child from jurisdiction or custody of lawful custodian
    - (a) The Company Commander will forward the matter with recommendations to the GCMCA for action.
    - (b) The GCMCA may, if appropriate, order the soldier to return at Government expense to the nearest port of entry to the jurisdiction.

d. If the charge, conviction, contempt or order to show cause involves a **family member** the following guidance applies:

- (1) The Company Commander of the soldier will forward the request with recommendations to the GCMCA for action.
- (2) The GCMCA (or an officer acting on his behalf) will strongly encourage the family member to comply with the court order.
- (3) If the family member fails to comply the GCMCA may take appropriate action including:
  - (a) Withdrawal of command sponsorship.
  - (b) Adverse action, up to and including removal from the Federal service by a supervisor, if the family member is a DA civilian employee.
  - (c) Curtailment of the soldier's military assignment outside of the U.S. or denial of a request to extend beyond normal tour length.
  - (d) Cancellation of orders to another OCONUS assignment.

5. Requesting a Delay or Exception.

- (a) The GCMCA may request a delay in taking action under this regulation up to ninety days in order to afford the subject of the request a reasonable opportunity to provide evidence of legal efforts to resist the order or to otherwise show legitimate cause for non-compliance.

- (b) The GCMCA must request delay within thirty days of the date the request for assistance is first received in the command.
- (c) The request for delay must be forwarded through the Legal Assistance Policy Division in the Pentagon to the Assistant Secretary of Army for Manpower and Reserve Affairs. The Assistant Secretary of Army for Manpower and Reserve Affairs is the approval authority of the delay.

## **VIII. SUPPORT ENFORCEMENT THROUGH GARNISHMENT.**

- A. Statutory Basis. 42 U.S.C. §§ 659-662 (2000); 5 C.F.R. pt. 581.
- B. Money Subject to Garnishment for Civilian Employees. 5 C.F.R. § 581.103(a) lists twenty-nine categories of pay to include:
  - 1. employee wages, salaries, commissions;
  - 2. sick pay, overtime;
  - 3. differentials; and
  - 4. bonuses.
- C. Money Subject to Garnishment for Military Service Members: 5 C.F.R. § 581.103(b) lists seventeen categories of pay to include:
  - 1. basic pay;
  - 2. special pay;
  - 3. bonuses;

4. incentive pay;
5. inactive duty training pay;
6. retired pay;
7. disability pay; and
8. separation incentives.

D. Money NOT Subject to Garnishment: 5 C.F.R. § 581.104 includes:

1. BAH;
2. BAS;
3. dislocation allowances;
4. family separation allowance; and
5. Cost of Living Allowances (COLA).

E. Money EXCLUDED from Garnishment: 5 C.F.R. § 581.105 includes:

1. debts owed by the individual to the United States;
2. required deductions by law:
  - a. fines and forfeitures,
  - b. amounts deducted for Medicare;
3. tax withholdings for Federal, State or local income tax;

4. health insurance premiums;
5. amounts deducted as normal retirement contributions; and
6. amounts deducted as normal government life insurance premiums (SGLI).

F. Authorized purposes for Garnishment.

1. Child support.
2. Alimony (separate maintenance, alimony *pendente lite*, spousal support).
3. Attorney's fees and court costs, **IF** defined by state law as a component of support **AND** expressly made a part of the recovery in the garnishment order.
4. Arrearages **IF** payment is called for by the garnishment order.

G. Garnishment Procedure:

1. Obtain a garnishment order issued by a state or federal court with jurisdiction over the support debtor. The garnishment order need not name the government entity that employs the obligor as the garnishee. 5 C.F.R. § 581.202(a).
2. Serve the garnishment order on the appropriate “designated agent” by certified or registered mail, return receipt requested, together with:
  - a. A copy of the underlying support order or the evidence that the garnishment is to enforce a support obligation, if it does not appear from the face of the process that it has been so brought (5 C.F.R. § 581.202(b)), and

- b. Sufficient identifying information so that the government entity can process the garnishment: The following information is requested:
  - (1) Full name;
  - (2) Date of birth;
  - (3) Employment number;
  - (4) Component and duty station; and
  - (5) Status of obligor. (5 C.F.R. § 581.203).
- 3. List of designated agents for the entire federal government is located at 5 C.F.R. pt. 581, Appendix A. The agents for Active, Retired, Reserve, and National Guard members of the Department of Defense is:
  - a. Assistant General Counsel for Garnishment Operations,  
Defense Finance and Accounting Service  
Cleveland Center—Code L (DFAS-CL/L)  
P.O Box 998002  
Cleveland, Ohio 44199-8002  
(216) 522-5301
- 4. Upon proper service of legal process, together with all supplementary documentation and information required by the regulation, the government entity shall identify the obligor and shall suspend payment of such money to comply with the order. 5 C.F.R. § 581.301.
- 5. The government entity shall send notice of the garnishment to the obligor not later than fifteen calendar days after receipt of the garnishment order. 5 C.F.R. § 581.302.

6. Military finance offices will honor a legal process (garnishment order) that is “regular on its face.” 42 U.S.C. § 659 (f). *See also United States v. Morton*, 467 U.S. 822 (1983) (holding that legal process regular on its face does not require the court have personal jurisdiction, only subject matter jurisdiction).
7. Exceptions to honoring a legal process regular on its face:
  - a. It is for an impermissible purpose; or
  - b. It fails to comply with 5 C.F.R. Pt. 581; or
  - c. The government has been served with an order enjoining or suspending the garnishment order; or
  - d. The government has received notice that the obligor is appealing the underlying support obligation and state law calls for suspension of garnishment during appeal.

H. Consumer Credit Protection Act Limits Amount Garnished: 15 U.S.C. § 1673.

1. 50% of disposable pay if soldier is supporting family other than those whom the garnishment order pertains to.
2. 60% of disposable pay if the soldier is not supporting other family members.
3. Plus additional 5% added to 50% or 60% if the arrearage is for 12 or more weeks.

## **IX. SUPPORT ENFORCEMENT THROUGH STATE WAGE ASSIGNMENT ORDERS.**

A. DFAS View.

1. Treat like garnishment.



2. Same rules as above apply.

B. State Court Use

1. Some states require 30 day arrears
2. Some issue automatically upon ordering support

**X. SUPPORT ENFORCEMENT THROUGH INVOLUNTARY ALLOTMENTS.**

- A. Statutory Authority. 42 U.S.C. § 665; 32 C.F.R. Pt. 54. Essentially, a federal wage assignment statute **applicable only to active duty military pay**.

B. Threshold Requirements. 32 C.F.R. § 54.4

1. Support Order: an order establishing a support obligation issued by a court or in accordance with administrative procedures under state law that afford substantial due process subject to judicial review.
2. Child and/or spousal support. The order must pertain to child and or spousal support.
3. Arrearage. Member has an arrearage equal to support payable for two months or longer.

C. Procedures: 32 C.F.R. § 54.6

1. Authorized Person. An **authorized person** must send a **signed notice** to the **designated official** (military finance center) requesting initiation of an involuntary allotment.

- a. Authorized person: Any agent or attorney of a state having an approved IV-D plan who has authority to seek recovery of child or child and spousal support; OR any court (or agent of the court) that has authority to issue a child support order against a member. 32 C.F.R. § 54.3(a).
  - (1) Private attorneys and legal assistance attorneys are **not** "authorized persons."
  - (2) Legal assistance attorneys may be able to arrange mutual cooperation with state child support enforcement agents.
- b. Designated Official: 32. C.F. R. §§ 54.3(c) and 54.6(f)
  - (1) Army: Commander U.S. Army Finance and Accounting Center, ATTN: FINCL-G, Indianapolis, IN 46249-0160 (317) 542-2155
  - (2) Navy: Director, Navy Family Allowance Activity, Anthony J. Celbrezze Federal Building, Cleveland, OH 44199 (216) 522-5301
  - (3) Air Force: Commander, Air Force Accounting and Finance Center, ATTN: JA, Denver, CO 80279 (303)-370-7524
  - (4) Marine: Commanding Officer, Marine Corps Finance Center (Code AA), Kansas City, MO 64197 (816) 926-7103
- c. Notice: A court order, letter, or similar document issued by an authorized person providing notification that a member has failed to make support payments under an order. 32 C.F.R. § 54.3(d). The notice shall include:
  - (1) A statement of delinquency in an amount equal to or exceeding two months support and a request for allotment pursuant to 42 U.S.C. 665 (notice of arrearage in excess of 12 weeks if appropriate);

- (2) A certified copy of support order;
  - (3) An amount of monthly payments and how much would be applied to arrearages;
  - (4) Sufficient identifying information (full name, social security number, military service);
  - (5) Full name and address of allottee;
  - (6) Any limitations on the duration of the support allotment; and
  - (7) A certificate that the official sending notice is an authorized person.
2. Notice to Service Member. Finance center notifies the service member (with copies of materials received from the state) and the soldier's commander.
3. Legal Counseling. The commander is responsible for providing a legal assistance attorney for the soldier.
4. Command Notice to Finance. The commander notifies the finance center that soldier has been counseled.
5. Allotment goes into effect:
  - a. After finance center receives notice that the soldier has consulted with a legal assistance attorney; OR
  - b. In the next pay period after thirty days elapse from the date of sending notice to soldier, whichever occurs first; AND
  - c. Stays in effect until the state says to terminate it; the soldier cannot stop an involuntary allotment.

6. Payee. Allotment is payable to the "authorized person" (or agency) or directly to the support obligee, as requested in the notice.
7. Amount of the allotment.
  - a. The amount of the monthly obligation, plus arrearages IF an order specifically calls for the payment of arrearages through the allotment.
  - b. Same percentage limitations apply as with garnishment (See Consumer Credit Protection Act).
  - c. Disposable Earnings subject to Involuntary Allotments: 32 C.F.R. § 54.6(b).
    - (1) Basic pay, some special pay and bonuses;
    - (2) BAH for all members with dependents, and for members without dependents in the grade of E-7 and above; and
    - (3) BAS for all commissioned and warrant officers.
  - d. Income Exclusions: Same as for Garnishments. See 32 C.F.R. § 54.6(c)

D. Defenses to Involuntary Allotments: 32 C.F.R. § 54.6(d)(5)

1. Substantial Error. Finance Center **may** decline to honor a request if the member provides an affidavit and supporting documentation, within thirty days of notice, showing substantial proof of error, such as
  - a. The support payments are not delinquent, or
  - b. The underlying support order has been modified, superseded, or set aside. 32 C.F.R. § 54.6(d)(5).

2. Request for involuntary allotment **may** be returned by the finance center without action if the notice fails to comply with procedures established by 32 C.F.R. § 54.6(a) or if the obligor cannot be identified.

## **XI. SUPPORT ENFORCEMENT THROUGH THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT: 10 U.S.C. § 1048**

- A. Authorizes division of disposable retired pay for purposes of child support and/or alimony payments—wage assignment of retired pay for support purposes.
- B. Requirements for direct payment of child support or alimony.
  1. Service. Service on the military finance center (see Garnishment section for address).
  2. Final Decree. A final court decree of divorce, dissolution, or legal separation (10 U.S.C. § 1408(a)(2)).
  3. Court of competent jurisdiction. Issued by a court of competent jurisdiction. 10 U.S.C. § 1408(a)(1).
  4. Child Support or Alimony. The order must direct child support or alimony.
  5. Arrearage not required.
  6. Limitation on Amount. The total of all direct payments under the USFSPA cannot exceed 50% of disposable retired pay. 10 U.S.C. § 1408(e)(c).
  7. See 32 C.F.R. Pt. 63 for further guidance on requesting direct payments.

## **XII. GARNISHMENT, INVOLUNTARY ALLOTMENTS, AND USFSPA COMPARED.**

### **A. Pay Subject to Process.**

1. Garnishment: Basic pay, bonus pay and retired pay.
2. Involuntary allotment: Basic pay, **BAH** and **BAS** and bonus pay.
3. USFSPA: Disposable retired pay.

### **B. Obligation Enforced.**

1. Garnishment: Child support and/or spousal support; arrearages; attorneys fees.
2. Involuntary Allotment: Child support or child support plus spousal support; arrearages.
3. USFSPA: Child support and/or spousal support.

### **C. Triggering Events.**

1. Garnishment: a garnishment order issued by a state court in accordance with state law.
2. Involuntary Allotment: a letter or court order issued by an authorized person, plus an underlying support obligation created by an administrative order or court order; and arrearages equal to two months support obligation.
3. USFSPA: a final decree of divorce, dissolution, or legal separation.

### **D. Amount Subject to Process.**

1. Garnishment: 50% - 65% of applicable pay.
2. Involuntary Allotment: 50% - 65% of applicable pay.
3. USFSPA: 50% of disposable retired pay.

### **XIII. WELFARE REFORM ACT.**

- A. President Clinton signed the Welfare Reform Act 22 August 1996.
- B. MAJOR changes in child support enforcement under Title III of the Act.
  1. Establishing Paternity.
    - a. Voluntary acknowledgments.
      - (1) Offered in all hospital births.
      - (2) A signed voluntary acknowledgment of paternity becomes a legal judgment after sixty days subject to challenge only for fraud, duress or material mistake of fact.
      - (3) Health and Human Services will specify minimum requirements for an affidavit of voluntary establishment of paternity.
    - b. Coordination of acknowledgments with birth records.
      - (1) A father must establish paternity either voluntarily acknowledging paternity or through a legal process to include his name on the birth certificate.
      - (2) Birth record agencies must offer voluntary paternity establishment services as well as hospitals.

- c. Streamlined legal processes.
  - (1) Parties seeking or opposing paternity must submit a sworn statement articulating reasonable facts supporting the existence or nonexistence of requisite sexual contact before genetic testing.
  - (2) States must pay costs of genetic testing ordered by a State agency with possibility of recoupment.
  - (3) States must change evidentiary rules to allow easier admission of genetic tests and voluntary acknowledgments of paternity.
  - (4) Prohibits right to jury trial in paternity cases.

2. Child Support Provisions.

- a. General Enforcement Provisions.
  - (1) License and passport revocation laws.
  - (2) Denial of other federal benefits to delinquent non-custodial parents.
- b. Automation and Location of Delinquent Parents.
  - (1) Expands the Federal Parent Locator Service.
    - (a) Federal Case Registry of Child Support Orders.
    - (b) National Directory of New Hires.
  - (2) State Registries.



- (a) Each state must establish a central state case registry of support orders or modifications.

- (b) State Directory of New Hires.

- (3) Centralized State Disbursement Units.

- c. Uniform Laws.

- (1) Adoption of Uniform Interstate Family Support Act (UIFSA).

- (2) Full Faith and Credit for Child Support Orders Act strengthened.

- (3) Uniform forms developed by Health and Human Services.

- C. Enforcement of Support Obligations Directed at Military Members.

- a. DOD locator system.

- b. New hire registry.

- c. Regulations facilitating the granting of leave for support hearings. No SSCRA protection for administrative hearings.

#### **XIV. CONCLUSION.**

**CHAPTER G**

**UNIFORM INTERSTATE FAMILY SUPPORT ACT  
(UIFSA)**

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# **UNIFORM INTERSTATE FAMILY SUPPORT ACT (UIFSA)**

## ***OUTLINE OF INSTRUCTION***

### **I. INTRODUCTION.**

- A. History.
- B. Goals.
  - 1. True uniformity in the child support arena.
  - 2. Efficiency in processing and collecting support payments.

### **II. SIGNIFICANCE OF UIFSA.**

- A. Replaced Uniform Reciprocal Enforcement of Support Act (URES A).
  - 1. As of 1 January 1998, all states enacted UIFSA (except New Jersey and Kentucky). However, NJ and KY also apply the UIFSA principles due to Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA).
  - 2. URESA v. UIFSA. While repealing URESA and enacting UIFSA, many states still have cases in the system begun under URESA. What statute applies to the particular case depends on state implementation of UIFSA; however, most states determine that the statute in effect at the time of filing the action controls, not the statute in effect upon determination of the case. *See DelToro v. McMullen*, 471 S.E. 2d 742 (S.C. 1996) *reh'g denied*, June 1996.

B. Welfare Reform Act of 1996.

1. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. Law 104-193, 110 Stat. 2105) signed by President Clinton on 22 August 1996 amended the Social Security Act to include a provision requiring states to adopt UIFSA by 1 January 1998. (42 U.S.C. § 666 (f)).
2. This provision, along with the Federal Full Faith and Credit for Child Support Orders Act (28 U.S.C. § 1738B), guaranteed the demise of URESA as a vehicle for interstate family support enforcement.

### III. KEY DEFINITIONS.

- A. **Continuing Exclusive Jurisdiction (CEJ):** A state that has issued a support order and remains the residence of the obligor, individual obligee or child, unless the parties agree in writing for another state to exercise jurisdiction. § 205 UIFSA.
- B. **State:** Any state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. It includes Indian tribes and foreign jurisdictions that have enacted a law or established similar procedures for the issuance and enforcement of support orders which are substantially similar to the procedures under this Act, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act. § 101(19) UIFSA.
- C. **Tribunal:** A court, administrative agency, or quasi-judicial entity authorized to establish, enforce or modify support or to determine parentage. § 101(22) UIFSA.
- D. **Home State:** The state in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than six months old, the state in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month or other period. § 101(4) UIFSA.

## **IV. JURISDICTION.**

### **A. Personal Jurisdiction.**

1. Broad long-arm statute.
  - a. Gives a tribunal personal jurisdiction over non-residents.
  - b. Applies to proceedings to establish, enforce, or modify a support order or to determine parentage.
2. Long-arm provisions of UIFSA:
  - a. individual is personally served within the state;
  - b. consent;
  - c. individual resided with the child in the state;
  - d. individual resided in the state and provided prenatal expenses or support for the child;
  - e. the child resides in the state as a result of the acts or directives of the individual;
  - f. individual engaged in sexual intercourse in the state and the child may have been conceived by that act;
  - g. individual asserted parentage in the putative father registry maintained by the state; OR
  - h. there is any other basis consistent with the constitution of the state and the U.S. to assert personal jurisdiction.
3. Affect: Results in a one-state proceeding even though parties are living in different states.

- a. The substantive and procedural rules of the forum state apply.
- b. Allows for more complete participation by the nonresident party by allowing for §§316 and 318 of UIFSA to apply. These provisions are special rules of evidence and discovery.

B. Simultaneous Proceedings.

- 1. One state can only exercise jurisdiction to establish a support order when a proceeding is filed in another state IF:
  - a. the pleading is filed before expiration of the time allowed to respond in the other state;
  - b. the contesting party challenges in a timely manner jurisdiction in the other state; AND
  - c. if relevant, this is the home state of the child.
- 2. Priority for home state of the child--if no home state then the first to file prevails.

## V. ENFORCEMENT OF SUPPORT.

A. In Rem Jurisdiction.

- 1. UIFSA does not change where a petitioner can seek **enforcement**.
- 2. Petitioner can seek enforcement in any state where the obligor derives income or owns property/assets.

3. UIFSA action is limited to the establishment, enforcement or modification of child support. A tribunal acting on a UIFSA action cannot determine collateral matters such as visitation. *Chaisson v. Ragsdale*, 914 S.W.2d 739 (Arkansas Sup. Ct. 1996): “UIFSA actions are not intended to open for the renewed scrutiny all issues arising out of a foreign divorce. The purpose of UIFSA is support of the child and enforcement of the same.”

B. Controlling Order. § 207 UIFSA.

1. One support order.
2. Multiple support orders.
  - a. If two or more support orders but only one CEJ, then the CEJ order controls.
  - b. If two 2 or more orders and more than 1 CEJ then the order issued by the child’s home state controls.
  - c. If two or more orders and more than 1 CEJ but there is no home state then the most recent order controls.
  - d. If two or more orders, no CEJ then the responding tribunal must issue a new support order (assuming personal jurisdiction over the obligor) then this new order controls.
3. The dollar amount of support contained in a support order has **NO** bearing on the controlling order determination.

C. Controlling Order Determinations.

1. An amendment to § 207 of UIFSA allows for a proceeding where a tribunal enters a finding of which of the multiple orders is controlling.
2. Requirements to request such a proceeding:



- a. An individual party must reside in the forum state;
  - b. The party requesting the determination must accompany the written request with a certified copy of every support order in effect.
  - c. Every party whose rights may be affected by a determination of the controlling order must be given notice of the request.
- 3. Notice.
  - a. The determination by a tribunal of a controlling order requires notice to every tribunal that issued or registered an earlier order of child support.
  - b. Must file certified copy.
  - c. Must file within thirty days of the determination of a controlling order.
- D. Enforcement of Arrears.
  - 1. UIFSA does not affect the calculation of arrears under existing orders.
  - 2. Arrears in child support are judgments entitled to full faith and credit [See Bradley Amendment to Social Security Act 42 U.S.C. § 666 a(9)].

## **VI. MODIFICATION OF EXISTING SUPPORT ORDERS.**

- 1. Jurisdiction Rules.
  - a. Only the tribunal with CEJ can modify a support order.

- b. Two ways to "take over" jurisdiction to modify:

**EITHER**

- (1) No one resides in the issuing state,
- (2) A petitioner who is a nonresident of the responding state seeks modification and
- (3) The responding state has personal jurisdiction over the respondent.

**OR**

- (4) Some person (obligor, obligee, or child) is subject to personal jurisdiction in the responding state, and
- (5) All individual parties (obligor and obligee) have filed a written consent in the issuing state for the responding state to modify the order and become the tribunal of CEJ.

- 2. Modifying the order gives the new state CEJ and thus jurisdiction over future modifications.
- 3. Applicable Guidelines. The law of the registering state governs the new support amount.
- 4. Non-modifiable aspects: Duration of the support.
- 5. One state modification: If all parties leave the issuing state and reside in the same state now UIFSA § 613 empowers the tribunal where both reside to modify the order.

## **VII. ENFORCEMENT OPTIONS.**

- A. Registration.

1. Can use registration for both enforcement and modification.
2. Registration is the primary method of enforcement under UIFSA.
3. Procedure. § 602 UIFSA requires that the following be sent to the responding state tribunal to register an order for enforcement:
  - a. A letter of transmittal requesting registration and enforcement;
  - b. 2 copies (1 certified) of all orders to be registered;
  - c. A sworn statement by the party seeking registration showing any arrearages;
  - d. Name of the obligor and if known:
    - (1) Address
    - (2) Social Security Number
    - (3) Name and address of employer
    - (4) Description of any property
  - e. Name and address of obligee and if applicable the agency or person to whom payment will be sent.
4. Choice of Law.
  - a. The law of the issuing state governs the nature, extent, amount and duration of current payments and arrearages under the order.
  - b. For arrearages, the longer of the statute of limitations of the issuing or responding state applies.

5. Notice to Obligor. The tribunal must notify the obligor of the enforcement action using the following procedures.
  - a. Notice by certified or registered mail, or personal service.
  - b. Provide a copy of the registered order and supporting documents.
  - c. Give notice of the following effects of registration:
    - (1) Registered order is enforceable as of the date of registration.
    - (2) 20 days to contest the validity or enforcement of the order.
    - (3) Failure to contest is waiver.
    - (4) Notice of alleged amount of any arrears.

B. Administrative Enforcement. § 507 UIFSA.

1. This is an alternative to registering the support order.
2. Procedure: The issuing state or a party or agency sends the documents to the responding state tribunal for registration. Before registering the responding state:
  - a. Can attempt any authorized administrative procedure to enforce the order.
  - b. If the obligor contests the order the Child Support Enforcement (CSE) agency of the responding state will register the order pursuant to § 609.

C. Automatic Income Withholding. §§ 501- 506 UIFSA.

1. This provision allows for direct contact with an employer of an obligor without filing a petition or pleading or even registering the order.
2. If an employer receives an out-of-state income withholding order that appears valid on its face, the employer **MUST** honor it subject to the obligor's opportunity to contest the order.
3. Rules on what to withhold: The law of the issuing state controls what and how much the employer must withhold. The law of the state where the employee's principle place of employment controls when withholding occurs (weekly, monthly) and the maximum allowed to be withheld. It also controls what fees the employer can charge to process the withholding.

## **VIII. PATERNITY AND UIFSA.**

- A. Section 701 of UIFSA allows a tribunal to serve as an initiating or responding tribunal in a proceeding under UIFSA or a similar act, like URESA, to determine paternity.
- B. A pure parentage action in the interstate context is allowed under this provision.
- C. Although a pure paternity action is allowed, it will more commonly be associated with a §401 petition to establish support also.

## **IX. FEDERAL FULL FAITH AND CREDIT FOR CHILD SUPPORT ORDERS ACT (FFCCSOA).**

- A. History.
  1. 28 U.S.C. § 1738B
  2. Signed and effective October 20, 1994.

3. Welfare Reform Act of 1996 amends it slightly to make it consistent with UIFSA.

B. Purpose.

1. Requires states to recognize and enforce valid ongoing child support orders.
2. Restricts a state's ability to modify another state's order.
3. Jurisdictional rules consistent with UIFSA.

C. Impact on URESA states.

1. Federal supremacy, it supersedes any state law to the contrary.
2. Practically, however, it depends on which avenue of enforcement the URESA action takes.
3. Impact if use filing a petition route of URESA.
  - a. Under this URESA action, the obligee files a petition in their state seeking enforcement of an existing order. This petition is forwarded to the responding state, which usually treats URESA proceedings as de novo hearings. Therefore, the responding state will apply its guidelines and issue a new support order. This leads to two competing orders!
  - b. Outcome is unclear--some courts find that the URESA order does not nullify or replace the original order and is therefore not a modification under FFCCSOA.
  - c. Most commentators and courts say this is exactly what the FFCCSOA and UIFSA seek to avoid because the reality is the original order will not in most cases ever be enforced by the responding state, only the order issued by the responding state will be enforced.

4. Impact if use the registration route of URESA.
  - a. Under this URESA action, the obligee registers the existing order in the responding state and the responding state files the order in a registry of foreign support orders. If there is no objection after notice to the obligor, the order is domesticated and enforced like a local order.
  - b. Most URESA states allow for these domesticated orders to be modified just like a local order. Under this URESA action, the FFCCSOA would prevent modification absent the special rules set out for modification. Except that some states treat registered URESA orders as domestic orders and say they lose their foreign identity and therefore modification is of a domestic order.

D. Written agreement to give jurisdiction to modify.

1. The FFCCSOA and UIFSA allow the parties to shift jurisdiction from the CEJ upon written agreement.
2. Consent clause is to be read strictly, and clear, written consent to jurisdiction is required. *Bednarsh v. Bednarsh*, 660 A.2d 575 (N.J. 1995); *OCS ex rel Michele Degolier v. Crone*, 21 Fam. L. Rptr. 1422 (Vt. 1995).

## **X. CONCLUSION.**

# CHAPTER H

## DIVORCE TAXATION

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# DIVORCE TAXATION

## Outline of Instruction

### I. REFERENCES.

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- E. IRS Publication 504, Divorced or Separated Individuals.
- F. IRS Publication 544, Sales and Other Dispositions of Assets.
- G. IRS Publication 555, Community Property.
- H. IRS Publication 590, Individual Retirement Arrangements (IRAs).
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## II. INTRODUCTION.

## III. FILING STATUS.

### A. Single Taxpayers.

#### 1. Defined.

- a. Anyone who is not married.
- b. Taxpayers are considered unmarried for the whole tax year if either of the following applies: I.R.C. § 7703.
  - (1) There is a final decree of divorce or separate maintenance by the last day of the tax year. State law will control to determine whether a taxpayer is divorced or legally separated.
  - (2) There is a decree of annulment, which holds that no valid marriage ever existed.
- c. Anyone who is married, but is separated pursuant to a decree of separate maintenance. Taxpayer is considered married for the whole tax year if there is no final decree of divorce or separate maintenance by the last day of the tax year. An interlocutory decree is not a final decree.
  - (1) According to the Tax Court, an individual is considered legally separated under a decree if the decree “expressly and affirmatively provides that the parties live apart in the future. Capodanno v. Commissioner, 69 T.C. 638 (1978), aff’d, 602 F.2d 64 (3<sup>rd</sup> Cir. 1978).

- (2) A voluntary separation under a voluntary separation agreement does not constitute legal separation for purposes of I.R.C. § 7703(a)(2). See, e.g., Kellner v. Commissioner, 468 F.2d 627 (2d Cir. 1972), aff’d per curiam T.C. Memo 1971-103; Johnson v. Commissioner, T.C. Memo 1980-9.
- d. The “Abandoned Spouse Rule.” I.R.C. § 7703b. A married but separated spouse who is not “legally separated” within the meaning of I.R.C. § 7703(a)(2) may nevertheless be treated as unmarried under the “abandoned spouse rule.” A married individual shall not be treated as married if the taxpayer:
  - (1) files a separate return from the spouse;
  - (2) maintains a home that is the principal place of abode of a “qualifying person” (defined later);
    - (a) A taxpayer maintains a home or household if he or she actually occupies it and it is the principal residence of the “qualifying person” for the period he or she actually lives there. Treas. Reg. § 1.143-1(b)(3); Treas. Reg. § 1.2-2(c)(1).
    - (b) Temporary absences from the household by the “qualifying person” due to illness, education, business, vacation, military service and visitation with the noncustodial parent will not interrupt the period of occupancy if under circumstances it is reasonable to assume the child will return to the household. Treas. Reg. § 1.2-1(c)(1); Treas. Reg. § 1.143-1(b)(3); Blair v. Commissioner, 63 T.C. 214 (1974).

- (3) furnishes over one-half of the cost of maintaining such household during the tax year; **and**
  - (a) Qualifying “costs of maintaining a household” are expenses incurred for “the mutual benefit of the occupants thereof by reason of its operation as the principal abode of such occupants.” Treas. Reg. § 1.2-2(d); Treas. Reg. § 1.143-1(b)(4).
  - (b) Such expenses include property taxes, mortgage interest, rent, utilities, maintenance and repair expenses, casualty insurance, and food consumed on the premises.
  - (c) The following expenditures do not constitute the costs of maintaining a household: clothing, education, health, vacations and support costs.
- (4) such taxpayer's spouse is not a member of such household during the last six months of the year.
  - (a) “Not a member of the same household” requires living in separate residences for the last six months of the year of the tax year.
  - (b) The spouse is considered to live with the taxpayer if he or she was temporarily absent due to special circumstances such as illness, education, business, vacation, and military service.

- (c) The Tax Court denied a head of household status to a wife who had moved out of the marital home in August after she was unable to evict her husband. The couple decided to terminate their marriage in June, but because the husband had been unable to find housing, he sometimes slept in her living room. The Tax Court stated that “living apart” requires geographical separation and means living in separate residences. Hopkins v. Commissioner, T.C. Memo 1992-326.
- (d) It made no difference where the stay beyond the sixth month period was outside the taxpayer’s control. Nemeth v. Commissioner, T.C. Memo. 1982-646.
- (e) The taxpayer did not satisfy this requirement where the spouses maintained separate bedrooms and bathrooms. Lyddan v. Commissioner, 721 F.2d 873 (1983).
- (f) Taxpayer unsuccessfully argued that he did not live with his wife, even though they resided in the same home, because they were emotionally estranged and did not share the same bedroom. The Tax Court concluded that the notion of “living apart” means “living in separate residences” and requires “geographic separation.” Chiosie v. Commissioner, T.C. Memo. 2000-117.

2. Single return (Form 1040, Line 1).

3. Head of Household (Form 1040, Line 4; I.R.C. § 2(b)).

a. Advantages of Head of Household Status:

- (1) Tax rates lower for head of household than those filing single.
- (2) Standard deduction is higher than is allowed on a single or married filing separate return.
- (3) For a married person who lived apart from his or her spouse during the last half of the tax year, qualifying as a head of household allows the use of tax rates that are more favorable than those for married persons filing separately.
- (4) May be able to claim credits, such as child care credit (I.R.C. § 21(e)(2)) and earned income credit, the taxpayer could not claim on a married filing separate return.

b. To qualify as a head of household, the taxpayer must:

- (1) Be a U.S. citizen or resident throughout the year, and
- (2) Unmarried or considered unmarried at the close of the year (“Abandoned Spouse Rule”), and
- (3) Paid more than half the cost of keeping up (maintaining) a home for the year, and



- (4) A qualifying person must have lived with the taxpayer for more than half the year.
  - (a) The taxpayer must be able to claim an exemption for the qualifying person. However, this test can still be met if the taxpayer does not claim the exemption only because the noncustodial parent is allowed to claim the exemption for the child (discussed later).
  - (b) Qualifying person is:
    - (i) an unmarried child, grandchild, foster child, or adopted child. The child does not have to be the taxpayers dependent.
    - (ii) any other relative whom the taxpayer can claim as a dependent. A dependent parent does not have to live with the taxpayer.
  - (c) A parent does not have to have custody of a child to be eligible for head of household filing status. However, the actual time a child spends at a parent's home is used to determine whether the residence constitutes the child's principal residence for over half the tax year.

B. Married Taxpayers.

1. Taxpayer is considered married for tax purposes if married on 31 December. (Unless he qualifies to be treated as “unmarried” –see “Abandoned Spouse” rule).
2. If the taxpayer lives together in a common law marriage that is recognized by the law of the state in which the taxpayer lives, or the state where the marriage began, the taxpayer will be treated as married.
3. If a spouse dies during the tax year, the surviving spouse is treated as married for that entire year and may file a joint return.
4. Filing choices for married taxpayers.
  - a. Joint return (Form 1040, Line 2; I.R.C. § 6013).
  - b. Married filing separately (Form 1040, Line 3; I.R.C. § 6012).
5. Nonresident alien spouse election. A taxpayer who is a U.S. resident or citizen may file a joint return with a nonresident alien spouse if both agree to be taxed on their world-wide income (see IRS Pub 519).
6. Joint return (I.R.C. § 6013).
  - a. The advantage of filing a joint return is that the marginal tax rates applicable are the lowest rates and the standard deduction allowable is the highest.
  - b. On a married filing jointly return, both spouses include all income, exemptions, and deductions.

- c. Disadvantage to a joint return:
  - (1) Both spouses are responsible, jointly and individually, for tax and any interest or penalty due on a joint return.
    - (a) The significance of joint and several liability cannot be overstated. The decision by parties contemplating a divorce to file a joint return must be made in recognition of this fact.
    - (b) If a deficiency of tax is assessed with respect to a joint return and the taxpayers no longer reside in the same household or are no longer married, upon the written request of either taxpayer, the IRS must disclose whether it has attempted to collect the deficiency from the other taxpayer, the general nature of the collection activities, and the amount collected. I.R.C. § 6013(d)(3).
  - (2) Exceptions for "Innocent Spouses" I.R.C. § 6015; Injured Spouse, IRC § 6402. See Divorce Taxation Outline.
- d. Practical Problems: signing returns and refunds.

7. Not filing a joint return may result in higher taxes.
- a. Married taxpayers cannot claim credit for child and dependent care unless a joint return is filed (I.R.C. § 21(e)(2)).
  - b. Married taxpayers cannot take earned income credit unless a joint return is filed (I.R.C. § 32(d)).
  - c. Married taxpayers cannot claim the Hope Scholarship or the Lifetime Learning credits unless a joint return is filed (I.R.C. § 25A(g)(6)).
  - d. Married taxpayers cannot deduct student loan interest unless a joint return is filed (I.R.C. § 221(f)(2)).
  - e. Married taxpayers cannot rollover a Traditional IRA to a Roth IRA unless a joint return is filed (IRC § 408A(c)(3)(B)(ii)).
  - f. Married taxpayers cannot take the credit for adoption expenses in most instances if filing a separate return.
  - g. Married taxpayers filing separate returns cannot exclude the interest from qualified savings bonds used for higher education expenses.
  - h. Married filing separately will result in the taxpayer being subject to the limit on the child tax credit, itemized deductions, and the phaseout of the deduction for personal exemptions at income levels that are half of those for a joint return.

8. Married filing separately (I.R.C. § 6012).
- a. If married individuals do not file a joint return and neither of them qualifies as unmarried under I.R.C. § 7703(b), they must each file a separate return using the married filing separately rates.
  - b. Each spouse reports own income, exemptions, and credits. Each spouse is responsible only for the tax due on his or her own return.
  - c. In most instances, filing of separate returns will result in the payment of more combined federal taxes than a joint return because the tax rate is higher for married filing separately.
  - d. Separate returns may save taxes where filing separately allows the taxpayer to claim more deductions. On separate returns, larger amounts of medical expenses, casualty losses, or miscellaneous deductions may be deductible because lower adjusted gross income floors apply.
  - e. If one spouse itemizes, both must itemize (not allowed to take the standard deduction if the other spouse itemizes).
    - (1) A married person filing a separate return cannot claim the standard deduction if their spouse files as head of household and elects to itemize deductions.
    - (2) However, if a married person filing a separate return itemizes, the other spouse can claim the standard deduction if filing as head of household.
    - (3) *See*, Significant Service Center Advice, ILM 200030023, Memorandum for Kenneth J. Rubin, Assistant District Counsel Pennsylvania District Counsel, from Lewis J. Fernandez by George Baker, Deputy Assistant Chief Counsel (27 Jun 00). A copy of the memorandum can be found at Tax Notes Today, 2000 TNT 147-42, July 31, 2000.

f. Taxpayers in community property states (i.e., Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, & Wisconsin):

- (1) may report one-half of community income on separate returns.
- (2) generally report their own income if living apart and file separate returns (I.R.C. § 66a; IRS Pub. 555, Community Property and the Federal Income Tax).
- (3) Cannot electronically file a MFS tax return.

C. IRS Individual Income Tax Return Filing Status.

1. Check the appropriate block on Form 1040, Lines 1-5.
2. Married filing separately must specifically list the spouse's name and social security number of the spouse on line 3.

#### **IV. INNOCENT SPOUSE RELIEF (I.R.C. § 6015)**

- A. In 1998, new provisions of the Internal Revenue Code were enacted in response to concerns that the former law was not providing proper relief to innocent spouses. Unknowing spouses, often divorced or deserted, found themselves responsible for huge tax deficiencies because of joint and several liability.
- B. Expanded innocent spouse relief applies to liabilities for tax arising after 22 July 1998 or before that remains unpaid.
- C. In the wake of the 1998 change making it easier to claim innocent spouse relief, the IRS expected 3,000 claims for such status but has actually received more than 79,000 claims (more than 90% from women since the summer of 1998). See *Tax Notes Today*, 2000 TNT 115-4 (Jun. 14, 2000).
  - 1. The majority of innocent spouse claims are filed by unrepresented taxpayers.
  - 2. Currently processing time for the claim is in excess of 300 days.
- D. In general, innocent spouse relief is easier to obtain. New provision eliminates all understatement thresholds and requires only that the understatement of tax be attributable to an erroneous item of the other spouse. Previously the understatement of tax had to be more than \$500.
- E. If innocent spouse relief is granted, the taxpayer can be relieved of responsibility for paying tax, interest, and penalties if the other spouse did something wrong on the tax return. If relieve is granted, the IRS can only collect for those items from the spouse.

F. Three types of relief:

1. Innocent Spouse Relief. I.R.C. § 6015(b).
2. Separation of Liability. I.R.C. § 6015(c).
3. Equitable Relief. I.R.C. § 6015(f).

G. Innocent Spouse Relief (I.R.C. § 6015(b)): In order to qualify for innocent spouse relief, the taxpayer must meet all of the following conditions:

1. The taxpayer filed a joint return which has an understatement of tax due to erroneous items of the spouse.
  - a. Erroneous items are either unreported income or incorrect deductions, credits, or property basis.
  - b. An understatement of tax is generally the difference between the total amount of tax that should have been shown on your return and the amount of tax that was actually shown on your return.
2. The taxpayer must establish that at the time he/she signed the joint return they did not know, and had no reason to know, that there was an understatement of tax. See, Butler v. Commissioner, 114 T.C. No. 19 (2000).
3. Taking into account all the facts and circumstances, it would be unfair to hold the taxpayer liable for the understatement of tax. A spouse seeking relief is not permitted to “turn a blind eye” to facts that are available to him/her. Charlton v. Commissioner, 114 T.C. 22 (2000). Two indicators the IRS may use to decide that it is unfair to hold a taxpayer responsible for the tax are whether the taxpayer:
  - a. Received any significant benefit (directly or indirectly) from the understatement of tax, or



- b. Were later divorced from or deserted by the spouse.

H. Relief by Separation of Liability.

1. Provides for a separate liability election for a taxpayer who, at the time of election, is no longer married to, is legally separated from, or has been living apart for at least 12 months from the person with whom the taxpayer filed a joint return. The election limits any deficiency to items allocable to that taxpayer.
2. The taxpayer making the request has the burden of proof in establishing the basis for separating liabilities.
3. Even if the taxpayer meets the requirement for separate liability relief, the request will be considered invalid if:
  - a. The IRS proves the taxpayer and spouse transferred assets as part of a fraudulent scheme.
  - b. The IRS proves that at the time the taxpayer signed the joint return they had actual knowledge that any items giving rise to the deficiency and allocable to the spouse were incorrect.
  - c. There was a transfer of property to the spouse (or former spouse) joint to avoid tax or the payment of tax.
4. Under the relief by separation of liability, the taxpayer allocates (divide) the understatement of tax (plus interest and penalties) on the joint return between the taxpayer and spouse (or former spouse). The understatement of tax allocated to the taxpayer is generally the amount the taxpayer is responsible for.
5. This relief by separation of liability can be requested whether or not the taxpayer requests innocent spouse relief.

- I. Equitable Relief: IRS has authority to relieve an individual of liability if relief is not available under the innocent spouse rule or separate liability election, but it would be inequitable to hold the individual liable for any unpaid tax or any deficiency. The IRS can grant equitable relief for responsibility for tax, interest, and penalties. In order to qualify for equitable relief the taxpayer must meet all of the following conditions:
  - 1. Taking into account all the facts and circumstances, it would be unfair to hold the taxpayer liable for the understatement or underpayment of tax.
  - 2. The taxpayer is not eligible for innocent spouse relief.
  - 3. The taxpayer is not eligible for separation of liability.
  - 4. The IRS has issued permanent guidance for individuals seeking equitable innocent spouse relief. Rev. Proc. 2000-15.
  - 5. Tax Court can review the denial of equitable relief. Fernandez v. Commissioner, 114 T.C. 21 (2000); I.R.S. Action on Decision, 2000-06.
- J. The IRS is required to inform the other spouse (or former spouse) if a taxpayer request innocent spouse relief or separation of liability, and will allow the spouse (or former spouse) to participate in the determination of the amount of the relief from liability. The “nonelecting spouse” has the right to participate in the administrative and judicial review of a claim for innocent spouse relief. Corson v. Commissioner, 114 T.C. No. 24 (2000).
- K. Expanded innocent spouse relief and separate liability election must be elected no later than two years after the date on which the IRS has begun collection activities.
- L. Tax Court has jurisdiction with respect to disputes about innocent spouse relief in two situations:
  - 1. If the taxpayer disagrees with the IRS’ determination notice telling the taxpayer the extent to which the request for relief has been denied.

2. If the taxpayer does not receive a determination notice from the IRS within six months from the date the Form 8857 was filed.
  3. A petition with the U.S. Tax Court in order for it review a request for innocent spouse relief. The petition must be filed no later than 90 days from the date the IRS mails its determination notice to the taxpayer.
- M. Innocent spouse relief is requested by filing Form 8857. The IRS will review Form 8857, figure the understatement or underpayment of tax and related interest and penalties, and notify the taxpayer if they qualify for innocent spouse relief.
- N. IRS advises taxpayers in abusive situations to note the issue on the top of the Form 8857 by writing “Abused Innocent Spouse” and highlighting it. That will alert the IRS to treat the information on the request for relief as very sensitive. See *Tax Notes Today*, 2000 TNT 115-4 (Jun. 14, 2000).

## **V. INJURED SPOUSE CLAIM & ALLOCATION**

- A. In some cases a joint overpayment (refund) is applied to a past-due obligation for child support, spousal support, or a debt owed the federal government (such as student loans). I.R.C. § 6402(c). Also, past due state income tax. I.R.C. § 6402(e)(1).
- B. The spouse not liable for the past-due support or nontax debt (the “injured spouse”), can file Form 8379 and the IRS can allocate the refund properly. Treas. Reg. § 301.6402-6(i)(2).
- C. A taxpayer can qualify as an “injured spouse” if the following conditions are met:
1. The taxpayer is not required to pay the past-due amount.
  2. The taxpayer received and reported income on the joint return (this condition does not apply if main home was in a community property state other than Arizona).

3. The taxpayer made and reported tax payments (such as tax withholding from wages), or claimed the earned income credit or other refundable credit on the joint return.
- D. Refunds that involve community property states must be divided according to local law. In community property states in which all community property is subject to the debts of either spouse, the entire refund can be used to pay those debts.
- E. The Injured Spouse Claim and Allocation is made on IRS Form 8379.
- F. Taxpayers that have not filed a current tax return should attach Form 8379 behind the regular tax return in the order of the attachment sequence and enter "Injured Spouse" in the upper left corner of the return.
- G. Taxpayers that have already filed a current year tax return and now wish to file a Form 8379 should mail the Form 8379 by itself to the IRS Center for the place the taxpayer lived when they filed their tax return. The taxpayer needs to include copies of their W-2 forms of both spouses, and any Form 1099-R showing income tax withheld.
- H. Part II of the 8379 allows the "injured spouse" to allocate between spouses of items on the joint return. The IRS will compute the amount of any refund due the injured spouse.
- I. The IRS has made available *Significant Service Center Advice* on how to apply a joint overpayment to separate liabilities. Memorandum, Assistant Chief Counsel (Income Tax and Accounting), Internal Revenue Service, to District Counsel, South Texas District, Austin, subject: Significant Service Center Advice (11 Feb 1998). A copy of the memorandum can be found in WESTLAW, Tax Notes Today, TNT Database, 98 TNT 124-70, June 29, 1998.

## **VI. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS.**

### **A. General Rule (I.R.C. § 71; Treas. Temp. Reg. § 1.71-1T).**

1. Alimony payments are considered gross income to payee.
2. Deductible by the payor as a deduction/adjustment from gross income (I.R.C. § 62(a)(10) and 215(a)). The payor does not have to itemize to be allowed the deduction.
3. Alimony is treated as earned income so the divorced spouse may separately establish an IRA and contribute up to \$2,000 per year or amount of alimony if less than \$2,000 per year. I.R.C. § 219(b)(4).

### **B. Requirements for Alimony Tax Treatment (I.R.C. § 71).**

1. Payments must be made in cash (I.R.C. §§ 71(b)(1), 215(b)). Debt instruments of the payor or a third party issued to or transferred to the payee are not considered cash payments. Treas. Reg. § 1.71-1T(b), Q&A-5.
2. Payments must be made and received under a qualifying instrument.
  - a. Includes a decree of divorce or separate maintenance, written separation agreement, or a decree requiring support or maintenance payments to a spouse.
  - b. The “instrument incident to a decree of divorce” generally describes writings containing marital settlement terms which are referred to but not merged in the divorce decree, including both formal separation agreements and writings which lack characteristics of a contract, such as a letter. In order for an instrument to be considered “incident to divorce,” the writing must provide adequate proof of the existence of a contract between the parties and it must memorialize the parties’ understanding regarding the payment terms. I.R.C. § 71(b)(2)(A), Brooks v. Commissioner, T.C. Memo. 1983-304.

- c. A written separation agreement in divorce practice ordinarily embodies a declaration of separation, the terms of the marital separation, and payment of support and division of marital property.
    - (1) Neither the Tax Code, nor the Treasury Regulations define “written separation agreement” for alimony purposes. Jacklin v. Commissioner, 79 T.C. 340, 346 (1982); Leventhal v. Commissioner, T.C. Memo. 2000-92; Keegan v. Commissioner, T.C. Memo. 1997-359.
    - (2) As construed by the IRS and the Tax Court, a separation agreement under I.R.C. § 71(b)(2)(B) need not be legally enforceable so long as it entered “in contemplation of separation status” and entails a meeting of the minds on the payment terms. Bogard v. Commissioner, 59 T.C. 97 (1972); Treas. Reg. § 1.71-1(b)(2)(I); Richardson v. Commissioner, 97-2 U.S.T.C. Para. 50,653 (7<sup>th</sup> Cir. 1997), (cash payments made pursuant to separation agreement later determined to be unconscionable and therefore unenforceable are taxable alimony to payee spouse regardless of the state court’s reason for invalidating the agreement).
  - d. Payments made merely to comply with a service regulation (e.g., AR 608-99) are not pursuant to a qualifying instrument and are not alimony.
  - e. If made under a decree of divorce or separate maintenance, the payment must be made after the decree (Treas. Reg. § 1.71-1(b)(1)). If made under a separation agreement, the payment must be made after the execution of that agreement (Treas. Reg. § 1.71-1(b)(2)).
3. The divorce or separation instrument must not designate that the payments will not be includable in the gross income of the recipient (see example provision, Appendix C, clause 2).

- a. A taxpayer and spouse may designate that otherwise qualifying payments are not alimony. This is done by including a provision in the divorce or separation instrument that states the payments are not deductible by the taxpayer and are excludable from the spouse's income.
  - b. However, if a divorce or separation instrument designates a payment that would otherwise qualify as alimony as not to be treated as alimony (e.g., as a property settlement), the payment will not qualify as alimony. I.R.C. § 71(b)(1)(B).
  - c. A taxpayer was divorced in Virginia and part of the settlement required him to provide his ex-spouse with 37.5% of his military retirement. Both parties were denied spousal support. Husband separated from the U.S. Navy and received a lump sum separation payment in lieu of retirement benefits. The ex-spouse petitioned a court in Illinois, where the husband resided to enforce the Virginia order. The IRS determined the payment was not an alimony payment and the husband could not deduct the payment. Generally, alimony is deductible to the extent the alimony is includable in the former spouse's gross income. However, both the Virginia decree and the Illinois order clearly contemplated that this payment was not to be alimony since neither party was to receive spousal support and the payment was to be a non-taxable event. Maloney v. Commissioner, T.C. Memo 2000-214, 2000 Tax Ct. Memo LEXIS 255.
4. There must be no requirement that payments continue beyond the death of the payee spouse (e.g., to the estate) or that any substitute payment is made after the death of the payee spouse (I.R.C. § 71(b)(1)(D)).
- a. Payments must end at death of the payee spouse. This requirement is to discourage classification of large cash settlements in payment for marital property as deductible alimony.

(1) Settlement agreement provided that taxpayer would pay certain sum for 142 payments without regard to death of payee spouse. Court looked to state law which did not help. Liability to make payments must terminate at the death of the payee spouse in order for such payments to be alimony. If a payor spouse continues to be liable to make even one otherwise qualifying payment after the death of the payee spouse, none of the related payments required before the payee spouse's death will be alimony. Cunningham v. Commissioner, T.C. Memo. 1994-474, 68 T.C.M. (CCH) 801 (1994) (Treas. Reg. § 1.71-1T(b), Q & A-13).

(2) Will not be considered alimony if the payments do not meet the requirement of I.R.C. § 71(b)(1)(D), that the payments not extend beyond the death of the payee spouse. Stokes v. Commissioner, T.C. Memo. 1994-456, 68 T.C.M. (CCH) 705 (1994).

b. To make sure of alimony treatment, the divorce or separation instrument should specify that otherwise qualifying payments will cease at the death of the recipient.

c. While alimony payments must terminate at the death of the payee, I.R.C. § 71(b) does not require that payments terminate at the death of the payor. If the payor's estate is required to continue alimony payments after the payor's death, the estate is not entitled to an alimony deduction for the payment. However, under I.R.C. § 682(b), such payments are treated as distributions to an estate beneficiary subject to the normal estate distribution rules. If the estate has distributable net income, the estate can take a deduction for the distribution and the payment is included in the payee's income as a distribution from the estate.

5. Payments must not be made during a tax year for which the payor and payee file a joint return. I.R.C. § 71(e).



6. Payments must not be to a member of the same household after a decree of divorce or separate maintenance has been issued or it will not be treated as alimony (I.R.C. § 71(b)(1)(C)). However, if spouses are not legally separated, a payment under a written separation agreement or temporary support order may be alimony even if they are members of the same household (Treas. Reg. § 1.71-1T(b), Q&A-9); Benham v. Commissioner, T.C. Memo. 2000-165 (May 22, 2000).
    - a. Spouses will not be treated as members of the same household if one spouse is preparing to leave it, and does leave within one month after the payment.
    - b. Coltman v. Commissioner, 980 F.2d 1134 (7th Cir. 1992), aff'd 61 T.C.M. 2207 (CCH) (1991), court applied Treas. Reg. § 1.71-1(b)(3)(i) and held that husband who used suburban marital home as part-time way station between his business and his real residence in another city, where he lived with "significant other" for most of the week, was not entitled to "alimony" deduction for payments to the former wife.
- C. Payments may be made to a third party if spouse consents or instrument specifically calls for the third-party payment. I.R.C. 71(b)(1)(A). These can include payments for spouse's living expenses, food, clothing, insurance, medical expenses, housing costs, taxes, tuition, vacations, etc. The payments are treated as received by the spouse and then paid to the third party. Temp. Treas. Reg. § 1.71-1T(b); Priv. Ltr. Rul. 87-10-089.
1. Payments to third parties encompass payments to third parties made pursuant to a written request, consent or ratification of the payee. The qualifying instrument or writing must declare the parties' intent that the payment be treated as alimony subject to the rules of I.R.C. § 71 and must be received by the payor spouse prior to the date of filing his or her income tax return for the taxable year in which the payment is made. Treas. Reg. § 1.71-1T(b), Q&A-7.

2. However, payments made to maintain property owned by the payor spouse but used by the payee spouse (including mortgage payments, realty taxes, and insurance premiums) are not payments on behalf of the payee spouse (i.e., not alimony) even if made under the terms of the divorce or separation instrument. Treas. Reg. § 1.71-1T(b).
  3. A payor spouse who is required by the divorce or separation instrument to pay the mortgage on a home he owns jointly with the payee spouse may deduct one-half of those payments as alimony, if they otherwise qualify (the rest may be deductible as qualified residence interest if paid on a qualified home).
  4. The Tax Court has held that a man may deduct as alimony one-half of the housing payments he made “on behalf of” his wife, finding that letters qualified as a written separation agreement. Leventhal v. Commissioner, T.C. Memo. 2000-92 (2000).
  5. Be careful of disguising child support as alimony. Payments which are for specific expenses of children as they arise may be considered child support and not alimony. Preston v. Commissioner, 2000 U.S. App. LEXIS 7190 (April 20, 2000).
- D. Premiums a taxpayer must pay under a divorce or separation instrument for life insurance on their life qualify as alimony to the extent the spouse owns the policy. Temp. Treas. Reg. § 1.71-1T(b).
- E. Compliance Provisions.
1. Recipient must furnish taxpayer ID number to payor. I.R.C. § 215(c).
  2. Payor must include recipient's number on return. I.R.C. § 215(c).
  3. Separation agreements should include parties' social security numbers (see sample provision, Appendix C, clause 3).
- F. Making Property Settlement Transfers as Alimony.

1. Alimony payments no longer need to be made in satisfaction of an obligation to support. The payments do not have to be periodic, or in discharge of a legal support obligation arising out of the marital or family relationship (Treas. Reg. § 1.71-1T(a)).
2. Rules limiting treatment of property transfers as alimony.
  - a. Alimony payments must be made in cash.
  - b. Recapture rules (effective for decrees after 1986) (I.R.C. § 71(f)(2)).
    - (1) If total alimony payments in year one exceed the average annual payments made in years two and three by more than \$15,000, the excess is recaptured in the payor's gross income in the third year.
    - (2) If payments in the second year exceed payments in the third year by more than \$15,000, the excess is recaptured in the payor's gross income in the third year.
    - (3) The recapture rules do not apply:
      - (a) if payments in three post-separation years are under \$15,000 per year,
      - (b) if the reason for the reduction is the death or remarriage of the payee spouse, or
      - (c) if payments change because they are based on a fixed portion of the income from a business or property or from compensation from self-employment (I.R.C. § 71(f)(2)).
    - (4) Example - see Appendix D.

## **VII. CHILD SUPPORT PAYMENTS (I.R.C. § 71(C); TEMP. TREAS. REG. § 1.71-1T).**

### **A. General Rule.**

1. Payments specified in a divorce decree or separation agreement as child support are **not** includable in gross income.
2. Child support payments are **not** deductible by payor.

### **B. Unallocated Family Support.**

1. If the amount of child support is not specified in the instrument, the amount to be decreased upon a contingency relating to a child will be treated as child support. Reverses rule of Commissioner v. Lester, 366 U.S. 299 (1961). Contingencies relating to a child include reaching the age of majority, marriage, death, earning specified income level, gaining employment, and leaving the home of custodial parent.

**Example:** Separation agreement provides that H shall pay \$500 per month for family support (unallocated). This amount shall be reduced by \$50 per week per year when H has uninterrupted visitation with the child. Amount of the reduction (\$50 is treated as fixed for child support. Total of \$2,600 (\$50 X 52 weeks) does not qualify as alimony (Priv. Ltr. Rul. 8746085).

2. Payments to be reduced at a time that can be "closely associated" with such a contingency will also be treated as child support.
  - a. Where payments are reduced not more than six months before or after the child is to attain the age of 18, or 21, or the local age of majority.
  - b. Where the payments are reduced on two or more occasions before or after a different child attains a certain age between the ages of 18 and 24, inclusive.

**Example:** Divorce decree grants a 30-year-old ex-wife custody of her 10-year-old son. Decree provides for unallocated support in amount of \$500 per month to be reduced to \$200.00 when ex-wife attains age of 38. A total of \$300.00 will be treated as "fixed" child support.

3. Effective for decrees executed after 31 December 1984.
4. Cases.
  - a. Preston v. Commissioner, 2000 U.S. App. LEXIS 7190; 13 Fla. Law W. Fed. C 603 (2000)(payments made by taxpayer to his former spouse and others for his children's expenses were not deductible as alimony and these payments were child support and nondeductible).
  - b. Bay v. Commissioner, T.C. Memo. 1994-389, 68 T.C.M. (CCH) 396 (1994) (unallocated family support and spousal maintenance payments originally structured (and treated as alimony) were transformed on ex-wife's remarriage into child support payments and were no longer deductible as alimony).
  - c. Fosberg v. Commissioner, T.C. Memo. 1992-713, 64 T.C.M. (CCH) 1527 (1992) (payments to a former spouse that were to be discontinued upon the earliest of the taxpayer's death, the taxpayer's remarriage, or the youngest child reaching age 18 were not alimony).

- C. Priority Rule (§ 71(c)). If all support payments (alimony and child support) are not made, the payments that were made will be treated as child support first.

## **VIII. EXEMPTIONS (FORM 1040, LINES 6a-d; 38).**

- A. Each personal exemption claimed on the 2001 tax return is the equivalent of a \$2,900 deduction.
- B. Personal Exemption (See generally IRS Pub. 501, Exemptions, Standard Deduction, and Filing Information).
  - 1. A personal exemption may be claimed only if another taxpayer is not entitled to claim the person (I.R.C. §151(c)(2)).
  - 2. Benefit of personal exemption is phased out for taxpayers with high incomes.
- C. Exemption for Spouse (I.R.C. § 151(b)).
  - 1. Automatic on a joint return. These exemptions are allowed whether or not a spouse has gross income or is a dependent of another taxpayer (though the other taxpayer will be denied an exemption) (Treas. Reg. § 1.151-1(b)).
  - 2. On a separate return, the taxpayer may claim an exemption for a spouse only if the spouse has no gross income, and is not the dependent of another (I.R.C. § 151(b)).
  - 3. If the spouse is a nonresident alien, has no income from U.S. sources, and is not a dependent of another person, the taxpayer may claim an exemption for the spouse on a separate return.

D. Exemption(s) for Dependents (I.R.C. § 151(e)).

1. An exemption is allowed for each person who qualifies as a dependent.
2. Children must have social security numbers.
3. Test for determining who is a dependent.
  - a. Member of household or relationship test (I.R.C. § 152(a)).
    - (1) Must be a child, stepchild, adopted child, foster child, brother, sister, parent, grandparent, or other qualified relative, or
    - (2) Must have lived with the taxpayer for entire year (Treas. Reg. § 1.152-1(b)).
  - b. Citizenship test (I.R.C. § 152(b)(3); Treas. Reg. 1.152-2(a)).
    - (1) Must be citizen or national of U.S. or
    - (2) Resident or national of U.S., Canada or Mexico.
    - (3) A resident alien can claim personal exemptions and dependency exemptions under the same rules as U.S. citizens. But no joint return can be made if either the husband or wife is a nonresident at any time during the tax year, unless the nonresident alien spouse elects to file a joint return and be treated as a resident for tax purposes. (I.R.C. § 6013(g); Treas. Reg. § 1.6013-1(b)).
  - c. Joint Return Test. Taxpayer may not claim exemption for a dependent who files joint return with another (I.R.C. § 151(e)(2)).

- d. Gross income test (I.R.C. § 151(e)(1)).
- (1) Dependent must have earned less than personal exemption amount (\$2,900 for 2001).
  - (2) Gross income test **does not apply** to a child of a taxpayer who is either under age 19 or a full-time student and under age 24 (I.R.C. § 151(c)(1)(B)).
    - (a) To qualify as a student, the child must, during some part of each of at least five calendar months, whether or not consecutive, during the calendar year in which the taxpayer's year begins, be a full-time student enrolled at an educational institution, or must pursue a full-time course of institutional on-farm training (I.R.C. § 151(c)(4); Treas. Reg. § 1.151-3(b)).
    - (b) An individual was entitled to claim a dependency exemption for his daughter who was a full-time university student. Although the daughter attended classes for only four months of the calendar year at issue, she was registered with the university for five months. The ordinary meaning of enrollment is registered and is not dependent on attendance. The intent of the regulation is that a student will qualify as full-time if registered for a semester in full-time course of study. Priv. Ltr. Rul. 98-38-027 (Sept. 21, 1998).
    - (c) A child who attends school exclusively at night is not a full-time student (Treas. Reg. § 1.151-3(b)).
- e. Support test (I.R.C. § 152(a)).
- (1) Taxpayer must have provided over one-half person's support.



- (2) Requires taxpayer to determine total amount of support furnished from all sources and the support furnished by the taxpayer.
- (3) In order to be entitled to the dependency exemption, the taxpayer must prove he provided over one-half of the child's support. Batson v. Commissioner, T.C. Memo. 2000-172 (2000).

E. Exemptions for Children of Divorced or Separated Taxpayers (IRC § 152(E)).

1. General Rule.

- a. The custodial parent is generally entitled to the exemption.
- b. Custody is usually determined by the most recent decree of divorce or separate maintenance. If there is no decree, then pursuant to a separation agreement.
- c. If neither a decree nor an agreement establishes custody, then the parent who had physical custody of the child for the greater part of the year is considered the custodial parent.
  - (1) Under this special rule the parent who had custody of the child for the greater part of the year, the "custodial parent," is generally treated as the parent who provided more than half the child's support.
  - (2) Focus on counting number of days of custody and not on amount of support provided.
- d. The identity of the custodial parent is not always clear, particularly where the divorce instrument provides that the divorced parents have shared 50-50 physical custody of the child.

- e. Practice Note: If a settlement agreement will provide for 50-50 shared custody and for alternating dependency exemption and dependent care credit between the parents from year to year, the agreement should identify which parent is the custodial parent for tax purposes.
2. Basic Requirements. I.R.C. § 152(e).
- a. Child must receive over half total support from both parents.
  - b. Parents must be divorced or separated pursuant to written agreement or decree or have lived apart for last 6 months of calendar year.
  - c. Child must be in custody of one of the parents for more than one-half of the year (see Rownd v. Commissioner, T.C.Memo. 1994-465, 68 T.C.M. (CCH) 738 (1994) (After child reaches majority, regular 5-part dependency test "reapplies"--especially where one parent provides college financial support; dependency exemption then goes according to normal rules)).
3. Exceptions to General Rule (IRC § 152(e)(2)).
- a. Custodial parent waives right to claim the exemption.
    - (1) Waiver can be permanent or annual.
    - (2) Noncustodial parent must attach the waiver to his tax return when claiming the exemption (each year) (IRS Form 8332).
    - (3) Can an IRS Form 8332 be nullified?
      - (a) This question is not answered on the form itself, any IRS publications, and the IRS has not published procedures for revoking the release.

- (b) The only way a custodial parent can void a Form 8332 and claim the child on his or her return, is to get the noncustodial parent to forego claiming that child as a dependent. If the two former spouses cannot agree and both claim the same child, then the IRS will step in and audit the returns. I.R.S. Legal Memo. 2000-07-031.
- (4) The Tax Court upheld the IRS in disallowing a noncustodial parent's claimed dependency exemption where he merely attached to his return a letter signed by his former wife which tracked the language of the divorce decree providing that the husband would be entitled to claim the children as dependents and that the wife would be required to sign any documents necessary to enable the husband to do so. The letter failed to state that the wife would not claim the children as dependents and lacked the other specific items of information required by the Code, Regulations, and Form 8332. White v. Commissioner, T.C. Memo 1996-438.
- (5) Under a divorce decree, the wife had sole custody of children, but the husband was provided the children on his tax return as exemptions. The husband claimed the children on his tax return, but did not attach a copy of Form 8332. Instead the husband attached a copy of a portion of the divorce decree to the return. The IRS disallowed the claimed dependency exemption by the husband. The wife did not claim the children on her return, but several years later contended she is entitled to the exemptions. The Tax Court held the husband was not entitled to claim the child as dependency exemptions because he failed to satisfy the requirement that the noncustodial parent attach a declaration signed by the custodial parent confirming that she would not claim the children. The Tax Court held the custodial parent was entitled to the exemptions. Miller v. Commissioner, 114 T.C. 13 (2000).
- (6) Practice Note:

- (a) The custodial parent should insist on any releases to the exemption being conditional on child support payment being current.
- (b) The noncustodial parent should insist on unconditional releases to avoid litigation in the event the custodial parent refuses to sign a release without cause.
- (c) The Form 8332 does not contain a cancellation date. The custodial parent need only sign the form once, but the noncustodial parent must attach it to his or her return every year.

- b. A multiple support agreement (IRC § 152(c); IRS Form 2120, Multiple Support Declaration).
  - (1) If two or more people together pay over half of the support of a child or other individual, but no one person alone pays more than half, one of the payors may be treated as having provided over half the support and may claim the supportee as s dependent if:
    - (a) The taxpayer paid over 10% of the total support;
    - (b) If not for the support test, the taxpayer could claim the dependency exemption with respect to the supportee; and
    - (c) The claimant attaches to his or her tax return an IRS Form 2120 signed by every other person who meets the previous two requirements.
  - (2) Form 2120 states that the person who signs it will not claim the dependency exemption for that year.
- c. The noncustodial parent is entitled to claim the child pursuant to a pre-1985 decree or agreement and provides over \$600 support for the child.

F. Significance of Claiming Dependency Exemption.

1. Either parent may claim a deduction for medical expenses paid for a child regardless of who claims the child as a dependency exemption (IRC §§ 213(d)(5) and 152(e)(6)).
2. Custodial parent waiving exemption may also claim earned income credit (IRC § 32).
3. Only the custodial parent may claim childcare credit even if the right to claim the child as a dependent is waived (IRC § 21).
  - a. The Code section does not allow the custodial parent to release the childcare credit to the noncustodial parent.
  - b. Divorced or legally separated parents who seek to claim the childcare credit for an under 13 year-old child must meet the custody test. That is where the child receives more than half of his support during the year from his parents, and is in custody of one or both of the parents for more than half of the calendar year. That parent need not be able to claim the child as a dependent and may even have released the dependency exemption to the other parent. I.R.C. § 21(e)(5).
4. Child tax credit.
  - a. Beginning in 1998 there was a child tax credit of \$400 and it increased to \$500 for 2000 (still \$600 in 2001-2004).

- b. The parent that is "allowed a deduction" with respect to such child will be entitled to the credit. Must be allowed to claim a dependency exemption for a child in order to take child tax credit (IRC § 24(c)(1)(A))

- (1) In order to claim the child tax credit, the parent must claim the child as a dependency exemption. The parent claiming the child tax credit must list the child as a dependency exemption on the tax form and include the qualifying child's name and social security number.
- (2) If the custodial parent waives the dependency exemption, the noncustodial parent gets both the exemption and the child tax credit.

5. Hope or Lifetime Learning Scholarship credits (IRC § 25A).

- a. Must be allowed to claim a dependency exemption for a child in order to take the Hope or Lifetime Learning Scholarship credits (IRC § 25A(f)(1)(A)(iii)).
- b. If a child who is claimed as a dependent by another taxpayer incurs qualified tuition and related expenses, the taxpayer, not the child, is deemed to have paid such expense for purposes of both the Hope and Lifetime Learning Credits.
- c. Married taxpayers incurring qualified expenses must file a joint income tax return in order to claim the educational tax credits. No credit under I.R.C. § 25A is allowed for married taxpayers filing separate returns. In order to claim the credit, the taxpayer must include the student's name and social security number on his or her return.

G. Planning Strategy for Dependency Exemption.

1. Which spouse will take the dependency exemption(s) and therefore be allowed the child tax credit and / or educational credits?
2. Analyze the true comparative tax savings of dependency exemptions and the child tax credit **per child** (for 2001):

- a. 10% tax bracket: Federal taxes saved from dependency exemption (\$2,900) equals \$290 plus the child tax credit of \$600 equals total tax savings of \$890.
- b. 15% tax bracket: Federal taxes saved from dependency exemption (\$2,900) equals \$435 plus the child tax credit of \$600 equals total tax savings of \$1,035.
- c. 27.5% tax bracket: Federal taxes saved from dependency exemption (\$2,900) equals \$797.50 plus the child tax credit of \$600 equals total tax savings of \$1,397.50.
- d. 30.5% tax bracket: Federal taxes saved from dependency exemption (\$2,900) equals \$884.50 plus the child tax credit of \$600 (however, see phase out) equals total tax savings of \$1,484.50.

(1) However, the credit is subject to a Phase-out.

(2) For taxpayers with modified adjusted gross income above certain thresholds, the otherwise allowable child tax credit is phased out. The amount of the credit is reduced (but not below zero) by \$50 for each \$1,000 (or fraction thereof) by which the taxpayer's modified adjusted gross income exceeds the threshold amount.

(3) The threshold amount is:

- (a) \$110,000 in the case of a joint return;



(b) \$75,000 in the case of an individual who isn't married; and

(c) \$55,000 in the case of a married individual filing a separate return.

3. In a year when the credit is \$600:

a. A couple with one qualifying child who file jointly are entitled to a credit of \$550 if their modified adjusted gross income is more than \$110,000 but not more than \$111,000. They lose the credit completely if their modified AGI is more than \$121,000.

b. A single taxpayer with one qualifying child isn't entitled to any credit if modified AGI is more than \$86,000.

4. Many custody arrangements today are for shared or joint custody of the child where each parent has physical custody for 50% of the time. This situation should be addressed in the divorce instrument by stating who is or how the custodial parent will be determined on a year-to-year basis.

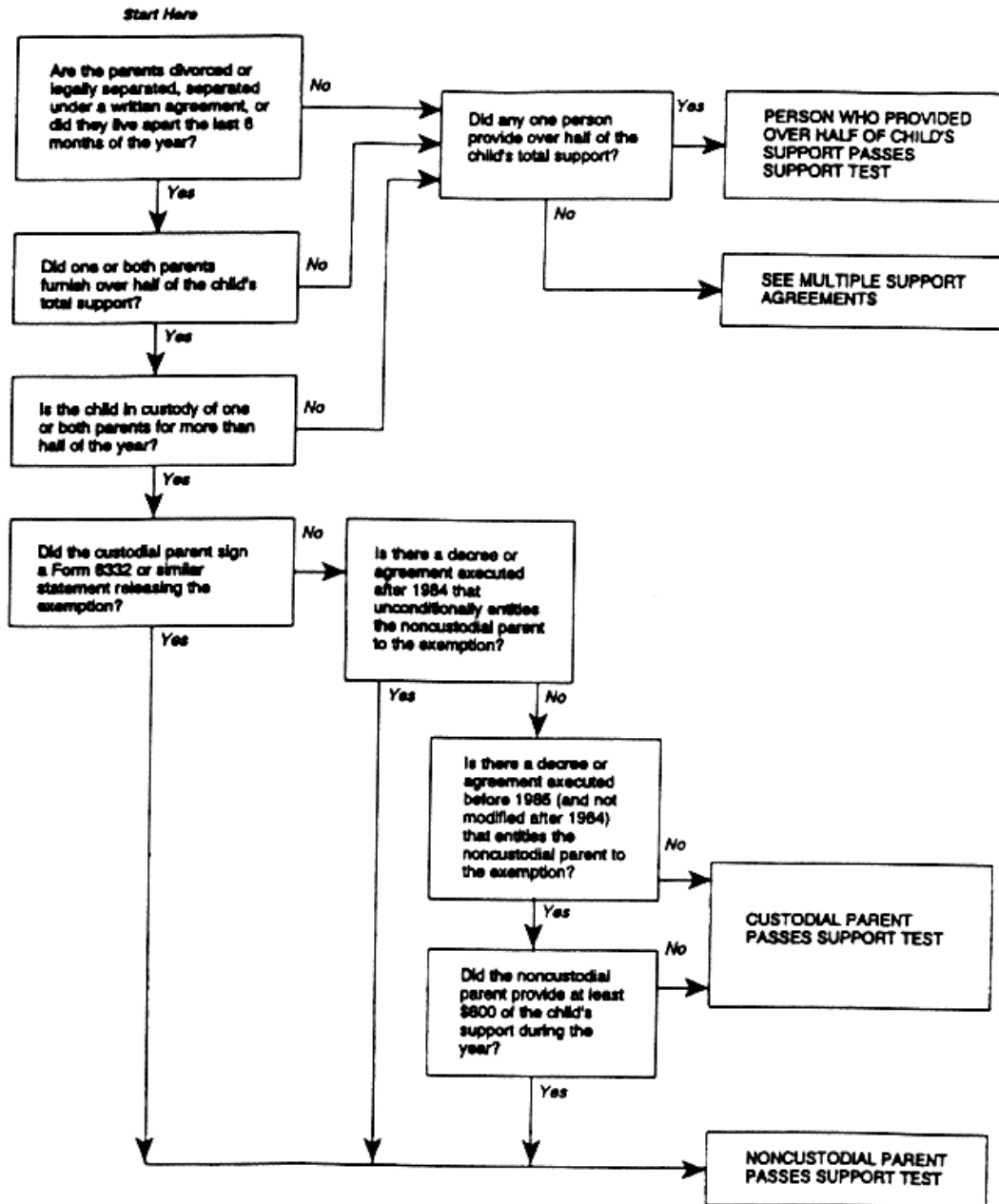
5. If the support test in the case of a child of divorced parents applies (I.R.C. § 152(e)), parents can decide between themselves who will take the dependency exemption with respect to their child. While neither the Code nor the Regulations expressly say so, presumably the transfer of the deduction can be made on an ad hoc basis each and every year. Where the custodial and noncustodial parents are in different income tax brackets, the deduction is more valuable to the higher bracket parent.

6. On a joint return, the married couple can claim exemptions for all persons who are dependents of either or both spouses. On a separate return, a spouse can claim exemptions only for his or her own dependents.

7. If a husband and wife in a community property state file separate returns they can divide the total of their exemptions for dependents between them, but they cannot divide between them any exemption for any one dependent.
- H. On a joint return, the married couple can claim exemptions for all persons who are dependents of either or both spouses. On a separate return, a spouse can claim exemptions only for his or her own dependents.
- I. If a husband and wife in a community property state file separate returns they can divide the total of their exemptions for dependents between them, but they can not divide between them any exemption for any one dependent.
- J. IRS Individual Income Tax Return Exemptions.
  1. Check the appropriate block for “Yourself” and “Spouse” if applicable (line 6a and 6b).
  2. On line 6c, the taxpayer must specifically list each dependent.
  3. Form preparation points to remember:
    - a. On line 6c the taxpayer must specifically list each dependent to include:
      - (1) The first and last name.
      - (2) Each dependents social security number (I.R.C. § 151(e)).
      - (3) The dependent’s relationship to the taxpayer.
      - (4) A check to indicate if the taxpayer is the child to qualify for the child tax credit.

- b. On line 6d add the total number of dependents being claimed (including spouse and self).
4. Multiply the total number of dependents claimed on line 6d times \$2,800 and place the total amount on line 38 (back of Form 1040).

## SUPPORT TEST FOR CHILDREN OF DIVORCED OR SEPARATED PARENTS



## **IX. AMENDING WITHHOLDING CERTIFICATE.**

- A. A taxpayer must amend his Form W-4, reducing the number of allowances, within ten days:
  - 1. When the spouse he has been claiming is divorced or legally separated from him, or claims her own allowance on a separate W-4;
  - 2. When he loses the right to an exemption for a claimed dependent;
  - 3. When he loses the right to the number of withholding allowances he has claimed. I.R.C. § 3402(f)(2)(B); Treas. Reg. § 31.3402(f)(2)-1(b).
- B. The employer must give effect to an amended W-4 no later than the beginning of the first payroll period ending on or after the 30<sup>th</sup> day after the day the amended W-4 is furnished. I.R.C. § 3402(f)(3)(B)(i).

## **X. PROPERTY TRANSFERS BETWEEN SPOUSES AND FORMER SPOUSES (I.R.C. § 1041; TEMP. TREAS. REG. § 1.1041-1T).**

- A. General Rule.
  - 1. Transfers of property and payments between divorcing spouses made pursuant to a written settlement agreement in settlement of marital and property rights or for support of issue of the marriage during minority will be deemed made for adequate consideration and therefore not a gift under I.R.C. § 2512(b) if the parties divorce within the three-year period beginning one year before execution of the agreement. I.R.C. § 2516; Treas. Reg. § 25.2516-1; Treas. Reg. § 25.2516-2.

2. Transfers between spouses or between former spouses, if incident to divorce, will be treated as gifts for tax purposes (I.R.C. § 1041).
  - a. The transfer is treated as acquiring the property by gift and the transferee's basis in the property received is the adjusted basis that the transferor had in the property. I.R.C. § 1041(b).
  - b. This rule applies even where the transaction is a sale between the spouses or where the transferee-spouse pays a sum of money to the transferor-spouse (as required under the divorce settlement) for the transfer of title to the property to the transferee spouse. Treas. Reg. § 1.1041-1T(a), Q&A-2.
  - c. The carryover basis rule applies whether the adjusted basis of the transferred property is less than, equal to, or greater than the fair market value at the time of transfer and applies for purposes of determining loss as well as gain, upon later sale by the transferee. Treas. Reg. § 1.1041-1T(d), Q&A-11. However, there are exceptions that apply to certain transfers in trust (where liabilities assumed by the trust exceed the transferor's adjusted basis) and to transfers of installment obligations into a trust. I.R.C. § 1041(e) and § 453B(g).
  - d. The transferor must, at the time of the transfer, give the transferee records sufficient to determine the adjusted basis and holding period of the property at the date of the transfer. Treas. Reg. § 1.1041-1T(e), Q&A-14.
3. Result--no tax on transfer because no recognition of gain or loss; transferor's basis carries over to transferee. Under the tax-free exchange rules, recipient spouse may incur tax liability on a later sale because his/her basis in the property is the same as the transferor-spouse's basis.

**Example:** In a property settlement accompanying a divorce, H plans to give W \$15,000 worth of stock that H bought for \$5,000. If W later sells the stock for more than \$5,000, W bears the tax burden for the profit above H's basis. W should bear this in mind in arriving at the settlement.

4. Rule applies not only to transfers for release of marital rights, but also for transfers in exchange for property, liabilities, or other considerations.

**Example:** Godlewski v. Commissioner, 90 T.C. 200 (1988). H and W purchased home jointly for \$32,200 in 1973. Property settlement agreement provided that W would convey her interest in home to husband for \$18,000. After paying W, H sold home to third party for \$64,000 in 1984. IRS used original basis (\$32,200) to figure gain. H contended that he was entitled to increase his basis to \$50,200 (original \$32,200 + \$18,000 he paid to buy W out). Tax Court disagreed--I.R.C. § 1041(b)(2) and Temp. Treas. Reg. § 1.1041-1T(d)A-11 preclude transferee spouse from increasing basis even in a bona fide sale when I.R.C. § 1041 applies. H owed tax on entire gain (\$64,000 - \$32,200).

5. Parties should transfer appropriate records to establish the basis of property involved in marital property transfers (see Appendix F for sample clauses mandating cooperation between the parties on marital property transfers).

B. Qualifying Transfers.

1. All transfers between current spouses.
2. Transfers between former spouses related to the cessation of the marriage.
  - a. Made pursuant to decree or divorce instrument and within six years of divorce (Temp. Treas. Reg. § 1.1041-1T(b) Q and A7; Priv. Ltr. Rul. 9306015 (Nov 13, 1992) (Transfer by taxpayer's former husband more than six years after end of marriage was not transfer incident to divorce under I.R.C. § 1041)), or
  - b. Made within one year from date of divorce. I.R.C. § 1041(c)(1).
3. Exception: transfers to a nonresident alien spouse are taxed (I.R.C. § 1041(d)).

C. Military Retired Pay:

1. Military retired pay received remains includable in income even after state court classifies it as property of both retiree and his former spouse. The Uniformed Services Former Spouses' Protection Act permits courts of competent jurisdiction to treat "disposable retired pay" payable to a member or former member as property of the member and his spouse (or former spouse) in accordance with the law of the jurisdiction of the court. However, for purposes of federal income taxation laws the state court order does not change the legal status of the retired pay from income subject to the income taxation to property subject only to the law of property. Priv. Ltr. Rul. 98-42-034 (Oct. 16, 1998).
2. Wife had taxable income on the amounts she received from her ex-husband's military retirement pay even though she received the payments under a property settlement. The payments were taxable because pensions are includable in gross income (I.R.C. § 61) and because the spouse had a property interest in her ex-husband's military retirement pension. Mess. v. Commissioner, T.C. Memo. 2000-37 (2000).
3. Under a property settlement agreement, wife was to receive fifty percent of her husband's monthly military retirement pay as a "property settlement." After the wife began to receive the payments, the husband deducted the amounts as alimony payments, and the wife did not report the monthly payments on her tax return. The Tax Court held that the payments the wife received were in fact alimony and includable in gross income. Labeling the payments as a "property settlement," without more, is not an explicit direction that the payments are not includable as gross income. The Tax Court noted that the provisions of the divorce decree and property settlement agreement did not specifically address the tax consequences of the payments, and a commonsense reading of the documents did not establish a nonalimony designation. Baker v. Commissioner, T.C. Memo. 2000-164.
4. See Appendix J for division of military retirement pay tax information.

D. Practical Considerations.

1. All other things being equal, the party in the lower tax bracket should be assigned assets with the greatest amount of unrealized gain. The value of appreciated property should be discounted by the amount of future tax liability.
2. Assets on which a loss will be recognized on sale should be assigned to the spouse in the higher income tax bracket.
3. If marital asset is family home, consider the impact of the transfer on eligibility to exclude the gain under I.R.C. § 121.

## XI. LEGAL FEES IN OBTAINING A DIVORCE.

A. General Rule. A taxpayer generally cannot deduct attorney fees incurred in connection with a divorce action. I.R.C. § 262, Treas. Reg. § 1.262-1(b)(7), (see United States v. Patrick, 372 U.S. 53 (1986); Gilmore v. United States, 290 F.2d 942 (Ct. Cl. 1961)).

B. Exceptions.

1. The portion of attorney's fees allocable to consultation and advice on tax matters is deductible (I.R.C. § 212(3)).
  - a. Allocation of fees in billing statement required. Hall v. United States, 78-1 U.S. T.C. (CCH T 9126 (Ct. Cl. 1978)); Carpenter v. United States, 338 F.2d 366 (Ct. Cl. 1964) (court permitted deduction of 70% of attorneys fees as allocable to tax matters).
  - b. Can include fees paid to appraisers, actuaries, and accountants for services in determining correct tax or in helping to get alimony.
  - c. Fees paid to a *spouse's* attorney for tax advice are not deductible. United States v. Davis, 370 U.S. 65 (1962).



- d. Taxpayer paying attorney fees for soon-to-be-ex-spouse may increase "alimony" to include ex's attorney fees and obtain increased "alimony" tax benefit.
- 2. A taxpayer may deduct attorney fees connected with the quest for obtaining taxable income such as alimony (see I.R.C. § 212(1); Treas. Reg. § 1.262-1(b)(7); Wild v. Commissioner, 42 T.C. 706 (1964), acq. 1967-2 C.B. 4).
  - a. Legal fees to collect past due amounts.
  - b. Seeking increases in alimony.
  - c. Working out an agreement for alimony.
- 3. A taxpayer who has been successful in reducing alimony payments may not deduct his attorney fees (Hunter v. United States, 219 F.2d 69 (2d Cir. 1955)).
- C. Miscellaneous Deduction Rule. Allowable attorney fees are an itemized deduction subject to the 2% limit on miscellaneous deductions.

## **XII. ESTATE PLANNING**

- A. Prior to or immediately after divorce.
- B. Revise existing documents.
  - 1. Wills.
  - 2. Trusts.
  - 3. Power of Attorney.
  - 4. Living Wills/Advance Medical Directives.

- C. Review inventory of assets and ownership. These items must be looked at by both the estate planning attorney and the family law attorney to make sure ownership is properly changed during the marital dissolution action.
- D. Review all assets owned with beneficiary designations.
- E. What are the new estate planning goals of the client?
  - 1. Explain to clients that have no existing formal estate planning documents what will happen with their assets upon their death during the pendency of the divorce if nothing further is done.
  - 2. Testate versus intestate pending divorce. What is the state law regarding disinheritance of a spouse versus a surviving spouse's right to elect to take a percentage of probate estate of the first spouse to die?
  - 3. Guardianships and Trusts for Children.
    - a. Same guardian for children as control over assets or different trustees and successor trustees?
    - b. To protect against need for court-directed guardianships (cost and time).

### **XIII. CONCLUSION.**

## APPENDIX A

### **DIVORCE TAX CHECKLIST FOR THE DOMESTIC RELATIONS PRACTITIONER**

#### A. General Tax Considerations.

1. What are the current taxable and nontaxable incomes of each of the parties? What are their projected incomes for the future? Their expenses?
2. Does either party presently plan to remarry in the near future?
3. Where will the parties' children live?
4. What is (a) the present fair market value, (b) the adjusted tax basis, and (c) the present holding period for each marital asset of the parties? Each material nonmarital asset?
5. What are the debts of the parties? Do they specifically encumber any assets?
6. Are there any business assets on which an investment tax credit has been claimed which may become personal assets of either spouse as a result of the divorce?
7. Does either spouse own stock in a closely held corporation?
8. Should parties file jointly this year? Any future years?
9. Allocation of dependency exemptions for children?
  - a. Does party in higher tax bracket have right to claim exemption?
  - b. Has custodial parent made waiver of right to claim child contingent upon timely receipt of support?

#### B. Support/Alimony Payments.

1. Does instrument expressly recite that payments cease on payee's death?
2. Are payments reduced or terminated on the happening of any contingency concerning an event in the lives of the parties' children or at a time which can clearly be associated with such an event?
3. Do any payments exceed \$15,000 per year in any of the first three years if the agreement is signed after January 1, 1987?

4. Have parties considered making support payments nondeductible and nonincludible?
  5. Has payor been advised to make support payments pursuant to a qualifying instrument?
- C. Property Division Checklist. Basic rule: transfers between spouses/former spouses no longer taxable events.
1. Have all divisible assets been identified, valued, and assigned a proper adjusted basis?
  2. Is any property to be sold?
    - a. Will gain/loss be realized?
    - b. Asset assigned to party able to maximize tax benefit of gain or loss?
  3. Have the parties considered sales of assets to third parties to recognize gain or loss?
  4. Is the transferee spouse a nonresident alien?
  5. Have the parties considered encumbering any assets and dividing the cash?
  6. Has investment tax credit been claimed on any assets which will become personal use assets after transfer?
  7. Have the parties been advised of the advantages of Sections 121 and 1034 in deciding what to do with their principal residence?
  8. Have high basis, low value assets been assigned to the party in the higher tax bracket? Have low basis, high value assets been assigned to the party in the lower tax bracket?
  9. Has all information on basis and holding period of transferred property been exchanged?

## APPENDIX B

### SAMPLE CLAUSES FOR FILING RETURNS

1. Clauses for filing a joint return.

- a. Husband and Wife agree that if no final decree of divorce has been entered on or before December 31, 20\_\_\_\_ they will file joint federal and state income tax returns for that year. They shall divide equally any refunds received or shall equally pay any taxes due.
- b. Each party shall be responsible for that fraction of the total tax imposed on their combined income for that year which is the same as a fraction, the numerator of which is his or her gross taxable income for the year and the denominator of which is the parties' combined gross taxable income for the year. Each party warrants and represents to the other that the information he or she will provide in connection with the filing of this joint return will be accurate and complete, and each hereby agrees to indemnify and hold the other party completely harmless from the consequences of any breach of this representation and warranty.
- c. The undersigned do hereby agree to indemnify each other, and hold each other harmless, for any interest, penalty, or deficiency resulting from, or imposed against, the joint federal and state income tax returns to be filed by us for the year XXXX. We further acknowledge that each of us is signing said income tax returns without necessarily having any knowledge as to the truth or falsity of any statements contained therein, except as may be furnished by each of us with reference to his or her own income expenses. We also agree to indemnify each other, and hold each other harmless, for any accounting or counsel fees or costs arising out of, or attributable to, any such interest, penalty or deficiency. The execution of this agreement shall be without prejudice to the right of either party to assert any position or claim with respect to the pending matrimonial action between the parties.

2. Future years' returns.

The parties agree to report all payments and transactions required by this agreement on their separate tax returns in accordance with the tax intent expressed in this agreement; to provide each other with such information (including, without limitation, information concerning the residence of the children and the basis and holding period for any asset) reasonably required by the other party in connection with the preparation of his or her federal and state income tax returns; and to execute and deliver to the other party such documents as may be required to implement the tax intent expressed in this agreement.

3. Clause for outlining rights on past years' returns.

The parties have previously filed joint federal and state income tax returns, paid all taxes due thereon, and divided all funds received for the years 20\_\_ through 20\_\_. In the event any further refund is received or any tax, interest, or penalty is determined to be due with respect to any such return after the date of this agreement, the parties shall equally divide any such refund or shall equally pay any such tax interest or penalty as the case may be.

## APPENDIX C

### SAMPLE CLAUSES RELATING TO SUPPORT PAYMENTS

1. Clause acknowledging taxability of maintenance payments.

The parties acknowledge that under present law payments by the Husband to the Wife are intended and will constitute taxable income to the Wife and a tax deduction to the Husband, and the sums provided for herein for maintenance payments have been computed with those tax consequences in mind and in consideration of the relative tax burdens and benefits to each of the parties.

2. Clause making payments nondeductible and nonincludible.

Husband shall pay to Wife the sum of \_\_\_\_\_ per month until the death of either party or Wife's remarriage or cohabitation, whichever shall occur first. The parties agree that these payments shall not be deductible by Husband or includable in Wife's income pursuant to Section 71(b)(1)(B) of the Internal Revenue Code.

3. Clause listing social security numbers and requiring parties to cooperate.

The Wife represents that her Social Security number is 000-00-0000; the Husband represents that his Social Security number is 111-11-1111. Each party shall provide to the other on a timely basis such income tax forms and information as may be necessary or desirable to comply promptly with the laws and regulations of any taxing authority.

4. Clauses protecting alimony payor against possible change in tax laws.

If maintenance payments should be or become no longer fully tax deductible to the Husband (or not used to reduce his gross income by the full amount of said payments), appropriate adjustments shall be made so that the after-tax burden of payments by the Husband shall be equivalent to his burden as though said payments were tax deductible by him.

If maintenance payments should be or become no longer fully tax deductible by the Husband or should no longer be fully tax reportable as income by the Wife, then there shall be an adjustment of the maintenance payments so that the relative tax burdens and benefits to the parties will be in the same proportion as they existed as of the time of the execution of this agreement.

## APPENDIX D

### EXAMPLE OF RECAPTURE RULES

This example illustrates the post-1986 recapture rules:

Colonel and Mrs. Ali Mony have decided to separate after years of marital discord. They've agreed to sell their family home for \$160,000 and share the proceeds equally. Colonel Mony proposes to transfer his wife's share in three payments over three of the years following the separation so he can take an alimony deduction for the payments in these years. Since Mrs. Mony will be completing her college education in the next two years and will not be working, she agrees to the proposal and it is written into their separation agreement.

Colonel Mony makes alimony payments of \$50,000 in the first post-separation year, \$25,000 in the second year, and \$5,000 in the third year. The payments made by COL Mony in years one and two are fully deductible by him and includable in Mrs. Mony's gross income. Colonel Mony must, however, recapture \$5,000 in year three for the second year's excess payment. This amount is the sum by which payments in the second year (\$25,000) exceed payment in the third year (\$5,000) by more than \$15,000.

Colonel Mony must also recapture \$22,500 in year three for the excess payment made in year one. This is the amount by which payment in the first year exceeds the average of payments in years two and three by more than \$15,000. When making this determination, note that only \$20,000 is treated as being paid in year two because the average of payments made in the second and third year does not include the \$5,000 that was recaptured.

#### Recapture for year two:

amount paid in year 2.....	\$25,000
amount paid in year 3.....	<u>\$ 5,000</u>
difference.....	\$20,000
less differential allowed. ..	<u>\$15,000</u>
amount recaptured.....	\$ 5,000

#### Recapture for year one:

amount paid in year 1.....	\$50,000
average paid in years 2 & 3	
(\$20,000 + \$5,000 x .5).....	<u>\$12,500</u>
difference.....	\$37,500
less differential allowed....	<u>\$15,000</u>
amount recaptured.....	\$22,500

Total recaptured in year three... \$27,500



## APPENDIX E

### SAMPLE CLAUSES RELATING TO DEPENDENCY EXEMPTION

1. Clause for release of dependency exemption to noncustodial spouse.

For the year 20\_\_\_\_ and any calendar year thereafter, the Husband provides any support to the Wife and/or for the children under paragraph \_\_\_\_\_, above, the Wife shall not claim the dependency exemption for any of the minor children of the parties for federal or state income tax purposes, the parties expressly agreeing that the Husband shall claim all such exemptions on his own returns. The parties further agree that each shall execute such documents, including any such form as may be provided by the Internal Revenue as the release of dependency exemptions, as are necessary and/or appropriate to effectuate the foregoing provision.

2. Clause for allocation of dependency exemption to a noncustodial spouse on a year-by-year basis.

As to any calendar year in which the Husband has made timely payment of all child care amounts for the benefit of JOHN (the minor child of the parties), that are required under paragraph \_\_\_\_\_ of this Agreement and that are due and payable as of December 31st of such year, the Husband shall be entitled to claim JOHN as his dependent for purposes of his federal and state income tax returns for such year; and, as to each and every such year as to which the Husband meets the foregoing requirement, the Wife shall execute an appropriate declaration releasing her right to claim JOHN as a dependent, such declaration to be executed and delivered to the Husband no later than January 31st of each year with respect to the preceding year.

3. Exemptions to be shared or alternated.

Husband shall be entitled to claim the parties' youngest child and Wife the parties' eldest child.

Husband shall be entitled to claim all three of the parties' children in odd-numbered years and Wife to claim them in even-numbered years.

## APPENDIX F

### SAMPLE CLAUSES RELATING TO PROPERTY TRANSFERS

1. Clause reciting that transfer of property is tax-free transaction.

The parties believe and agree that the transfers of property between them required by paragraphs \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, above, are tax-free transfers of property between them made pursuant to Section 1041 of the Internal Revenue Code and are not taxable sales or exchanges of property or payments for alimony or child support. Each party covenants and agrees not to take any position inconsistent with this belief and agreement, including, without limitation, any position with respect to the basis of any asset on his or her tax returns filed after the date of this agreement.

2. Clause containing transferor's warranties as to basis and holding period.

Husband warrants and represents to Wife that he has held the \_\_\_\_\_ stock to be transferred to her pursuant to paragraph \_\_\_\_\_, above, since \_\_\_\_\_ and that his adjusted basis therein at the time of transfer to Wife will be \_\_\_\_\_. Husband hereby agrees to provide Wife with such documents and information as she may require from time to time to establish these matters.

## APPENDIX G

### TAX & PARTICULAR ASSET TRANSFERS

**Annuities:** Under § 72, an annuitant excludes from gross income a pro rata portion of the annuity's cost from each annuity payment received. The transferor spouse may transfer his interest in an annuity to his transferee spouse and the latter continues to exclude from each payment a pro rata portion of the cost.

**Life insurance:** Transfer of a life insurance policy from the insured transferor spouse to the transferee spouse would normally not produce any income (§ 1041(b)(1)), estate (§ 2042), or gift (§ 2516) tax. [Note: Except for a qualifying transfer made pursuant to divorce, the proceeds and the gift tax paid on the transfer would be included in the decedent's gross estate if the transferor should die within three years of the transfer (I.R.C. § 2035(c), (d)(1)). I.R.C. § 2043(b)(2); however, places any qualifying transfer between divorcing spouses outside the gross estate, even if made within three years of death.] By reason of the transfer, the proceeds of the policy would be exempt from income tax if paid by reason of the death of the insured (§ 101(a)(1)). The premiums may be paid as alimony under a provision like this one:

H shall transfer to W ownership of the \_\_\_\_\_ Life Insurance Company \$\_\_\_\_ life insurance policy on his life and shall pay all future premiums due on this policy until W's death or his death, whichever shall first occur, as alimony.

**IRAs:** Under § 408(d)(6), they may be divided tax-free between divorcing spouses upon the entry of an appropriate court order or execution of an appropriate agreement. The portion of the IRA paid to the nonowner spouse may be placed in a new IRA for his/her benefit. [NOTE: a non wage earning spouse receiving alimony remains eligible for a deductible IRA, providing that he/she is not covered under an employer's plan.]

**Marital home:** No tax on transfers pursuant to § 1041. If the spouses sell the home, there will be no tax on the gain provided that they have lived in the home for two years and the gain does not exceed \$250,000 (\$500,000 if they file a joint return). In addition, so long as the spouse who leaves the home does so pursuant to a divorce or separation instrument, he will be treated as having lived in the home for purposes of excluding the gain under I.R.C. § 121. There are some advantages to the spouse who retains the marital home:

- a. Mortgage interest deduction (if itemize);
- b. Real estate tax deduction (if itemize);
- c. Eventual exclusion of the gain, if the two-year test is not met at the time of divorce.

**Transfers of savings bonds.** Rev. Rul. 87-112, 1987-2 CB 207, holds that the owner of Series E or EE savings bonds electing to defer annual reporting of income thereon must include in reportable income all accrued value of the bonds in the year of transfer to a spouse under a marital settlement agreement. Section 1041(a) is held not to shield "income," as opposed to "gain," from recognition. Effect - this ruling seeks to and treats the accrued and untaxed interest increment on bonds as an "assignment of income" problem and, in keeping with such characterization, as assignment of income to another, is recognized immediately as taxable income to the owner of the income so assigned. Of course, the spouse receiving the bonds receives a step-up in basis equal to the FMV of the bonds, including the income subject to tax in the transferor's hands.

## **APPENDIX H**

### **DIVIDING MORTGAGED PROPERTY**

Under existing tax law, no gain is realized when a taxpayer borrows money and secures a loan with a mortgage on the property. The obligation to repay offsets the loan so that neither the taxpayer's basis in the property nor his/her net worth is affected. But on a later sale, gain (or loss) is calculated by subtracting the property's adjusted basis, without reference to the loan, from the amount realized on the sale of the property which includes the amount of the mortgage indebtedness.

Example: H and W jointly own property, with a zero basis, subject to a \$30,000 mortgage, and FMV of \$150,000. Pursuant to divorce instrument, H transfers his interest to W, subject to the mortgage. Under the current law, H recognizes no gain and W's basis is \$30,000 (\$15,000 plus a carryover of \$15,000).

Section 1041 makes planning in this area considerably simpler, inviting an encumber and divide strategy. In the above example, the property could have been mortgaged for an additional sum of \$120,000, so that its "net value," i.e., value net of encumbrances, is zero. The spouses have taken advantage of the appreciation in the value of the property to "squeeze out" potential gain in the form of loan proceeds, which they own jointly. H could then transfer his interest in the property to W, with W assuming the mortgage. H is bailed out of the property and left with \$60,000 cash in hand at no tax cost (§ 1041(b)(2)). When W later sells the property, gain will be recognized: if W sells for \$10,000 cash subject to the mortgage liability of \$150,000, she realizes \$160,000. Since her basis is the pre-divorce basis of \$30,000, there is a \$130,000 gain on the sale.

## **APPENDIX I**

### **KEY DIVORCE TAX PRACTICE TIPS**

1. If representing a custodial parent, agree to make annual waiver of right to claim an exemption on behalf of a child contingent upon receipt of timely, adequate support.
2. Advise clients making voluntary support payments (i.e., pursuant to AR 608-99) to execute a qualifying instrument.
3. Continue to specify in separation agreements that alimony payments cease on death of payee spouse.
4. Any support payments to be reduced upon a change in a child's status will be treated as nondeductible child support.
5. Ensure that clients receiving appreciated marital property discount the value of that property for future tax liability.
6. Advise divorcing taxpayer who had been claiming marital status for withholding to file a new Form W-4 within 10 days after divorce.
7. Counsel spouse regarding the Innocent Spouse rules and consider the liability election pursuant to I.R.C. § 6015.

## APPENDIX J

### DIVIDED RETIREMENT PAY TAX INFORMATION

The Defense Finance and Accounting Service (DFAS) reports retirement income to military retirees using IRS Form 1099-R. For marriages ending on or after 3 February 1991, the military retiree is not taxed on that portion of retired pay the finance center pays direct to a former spouse. (See Public Law 101-510, section 555, enacted on 5 November 1990.) Disposable retired pay is now calculated before taxes are withheld. Under this law, DFAS will withhold taxes from and report payments to the IRS separately for each payee (retiree and former spouse) when making direct payment to a former spouse.

The retiree's Form 1099-R will reflect net retired pay (gross retired pay minus gross payment to the former spouse). DFAS will also issue the former spouse a Form 1099-R to show taxes withheld from any retired pay DFAS paid to the former spouse as property divided under a court order.

In cases where the retiree, and not DFAS, makes the payment to the former spouse, DFAS withholds and reports only with respect to the retiree, whose 1099-R will reflect the entire amount of the retirement pay. In these cases and those cases under the pre-3 February 1991 rules, retirees should subtract from income the amount paid to the former spouse during the year from the amount stated on the 1099-R and attach an explanatory letter to the tax return. The letter should state that the amount subtracted was paid to a former spouse under the Uniformed Services Former Spouses' Protection Act (USFSPA) pursuant to a divorce decree and MUST identify the former spouse by name and Social Security number.

Before the amendment to the USFSPA (effective 3 February 1991), disposable retired pay (which is what can be divided) was calculated after income taxes were withheld, i.e., if a former spouse was entitled to 50% of the disposable retired pay, the 50% was figured on the amount left over after taxes were withheld. DFAS did not withhold taxes from, or report to the IRS, any amount paid directly to the former spouse. Although each party was responsible to pay taxes on the portion of the retired pay received, the parties had to make the adjustment on their respective tax returns.

**Example:** Suppose H receives \$200 in retirement pay before taxes, W is awarded 50%, and the applicable tax rate is 20%. Under the pre-Feb 91 law, taxes (\$40) are subtracted first from the total retirement pay to determine what is divided (\$160). Thus, W's share is \$80. If DFAS did not separately report and withhold for W, it would pay W \$80 and H \$80, but it would report \$200 to the IRS as taxable income for H (no report for W). Thus, H is credited with the \$40 tax withheld. This might result in W paying the tax on the \$80 she received without any adjustment from H at the end of the year. Post-Feb 91, the tax calculation occurs after determining disposable retired pay (here \$200, \$40 tax); and DFAS reports \$100 taxable income to each; and IRS "credits" each with \$20 tax withheld.

Amounts of retired pay that go to a former spouse as alimony, child support, or a voluntary allotment continue to be reported as income to the retiree and appear on the retiree's Form 1099-R. They are not reported on a Form 1099-R to the former spouse.

**CHAPTER I**

**INTRODUCTION TO SEPARATION AGREEMENTS**

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# **INTRODUCTION TO SEPARATION AGREEMENTS**

## ***OUTLINE OF INSTRUCTION***

### **I. PROFESSIONAL CONDUCT CONSIDERATIONS**

### **II. BASICS**

#### **A. Types of Agreements.**

1. Property Settlement Agreements
2. Separation Agreements

#### **B. Legal Requirements**

1. Valid marriage.
2. Capacity to contract.
3. Fact of separation or imminent separation.
4. Consideration.
5. Legal purpose.
6. Full disclosure of pertinent information between the parties.
7. Fair provision for the disadvantaged party.
8. Form.

a. Written

b. Oral

C. Choice of Law

1. Normally the law of the jurisdiction where executed.

2. Parties may express a contrary intent.

D. Scope of the Agreement

1. As comprehensive or as narrow as the parties can agree.

2. Omitting issues.

a. Parties may cool off and later be able to reach agreement.

b. Problems.

E. Duration of the Agreement

1. Interim agreements.

a. Courts generally recognize as interim if stated as such.

b. Problems may arise as they become more comprehensive or when the parties live under the provisions for a long time.

2. Final agreements.

a. What law may apply and are we capable of interpreting it?

- b. Merger v. Incorporation v. Acknowledgement.

### **III. PRELIMINARIES**

#### **A. Representation.**

##### **1. The attorney's role.**

##### **a. Setting the tone for the client.**

- (1) Client's relations with the other spouse.
- (2) Ensure the client has realistic expectations of outcome.
- (3) Explain the legal processes involved and the problems that the case presents.
- (4) Explain your role: problem solver v. no-holds-barred advocate.
- (5) Explain the client's role and responsibilities.
- (6) Discuss asset preservation.

##### **b. Advising the client on legal aspects vs. guiding the client towards a position.**

##### **c. Working through the client vs. negotiating with opposing counsel.**

##### **2. Dual representation.**

##### **a. Civilian advice - don't do it; the parties inevitably have adverse positions.**

- b. AR 27-3, paragraph 4-9c. LAA's from the same office should not see opposing spouses.

3. One-sided representation.

- a. Avoid the situation.
- b. Sample provision if you must proceed in this manner: **In the negotiation and execution of this separation agreement, \_\_\_\_\_ was not represented by legal counsel. During the negotiation and prior to the execution hereof he/she was advised of his/her right to consult with counsel, of the availability of free legal counsel, and of the desirability of consulting with counsel before executing this agreement because it affects important personal and financial rights. By his/her signature on the line below and his/her execution of this agreement, \_\_\_\_\_ represents that he/she has not received any advice from \_\_\_\_\_'s attorney other than the recommendation to consult with counsel of his/her choice, and he/she hereby waives his/her right to counsel.**

\_\_\_\_\_ (signature)

- c. Don'ts:
  - (1) Don't contact the other spouse except to advise him or her to consult with an attorney.
  - (2) Don't suggest that the spouse see a specific LAA (or any other named attorney) and don't let client do so.
  - (3) Don't "bend over backwards" to be watch out for the spouse - represent your client to the best of your ability.

B. Gather facts and documents.

- 1. Marriage certificate and prior divorce decrees.

2. SSN's
3. Antenuptial and postnuptial agreements.
4. Citizenship.
5. Education, training and work experience of the parties.
6. Date's of soldier's military service.
7. Children - names, DOB's, SSN's, other children being supported, special needs, natural or adopted children.

C. Property division. [Often used acronym is I-C-E-D]

1. IDENTIFY all of the property.
  - a. Real property.
  - b. Personal property - tangible (e.g., household furnishings, motor vehicles, lawn and garden equipment, books, china, crystal, jewelry, etc.)
  - c. Personal property - intangible (e.g., bank accounts, mutual funds, stocks and bonds, CD's, retirement benefits, IRA's, etc.)
2. CLASSIFY
  - a. Separate property - often described as premarital property, plus gifts or inheritances to one of the parties during marriage. Professional degrees or licenses may or may not be separate property. In some states, non-vested pension rights are separate property.

- b. Marital (or community) property - generally described as all property acquired by either or both of the parties during the marriage (unless it falls into one of the above categories of separate property).
  - c. Mixed - this is property that starts as one category and then has added to it components of the other category.
- 3. EVALUATE the marital, separate and mixed property.
  - a. Certain items are easy to evaluate - bank accounts (look at bank statement), mutual funds (read stock market section of the newspaper).
  - b. Some items may require some research - motor vehicles ("blue book").
  - c. Some items may require an expert - house (real estate agent or appraiser), retirement rights (CPA, economist or actuary), business (CPA, financial advisor).

#### **IV. SPECIFIC PROVISIONS**

##### **A. Recitals.**

- 1. Data and place of marriage.
- 2. Names, DOB's of children.
- 3. State that the parties are living separate and apart and the date they commenced to do so, or at least that they intend to do so when the agreement is completed or when transportation is available.
- 4. Identify any pending legal proceedings by case number and court.

5. State the reason for the action and the purpose of the agreement (e.g., "Unhappy and irreconcilable differences have arisen between the parties, and their health, welfare, and general happiness require that they live separate and apart. They do not intend to live together again as husband and wife.")
6. State each party's current employment status and expected future employment status.
7. State the consideration supporting the agreement (usually phrased in terms of "valuable consideration, the receipt of which is hereby acknowledged.")
8. Advice of counsel.
  - a. Include your name as counsel for your client.
  - b. Sample provision:
    - (1) Each party has consulted with counsel of his or her own choice, independently selected without suggestion by the other party. Neither party was precluded from obtaining an attorney of his or her choice because of the cost of attorney fees, and neither party has at any time received advice or counsel on this matter from the other party's attorney.
    - (2) Husband's attorney throughout the negotiation of this agreement has been \_\_\_\_.
    - (3) Wife's attorney throughout the negotiation of this agreement has been \_\_\_\_.

(4) The parties have reached agreement on the matters contained herein only after receiving advice from counsel on every question either of them has raised. Issues discussed by each party include legal rights and obligations under state and federal law and the legal effect of each clause in this agreement. The parties and their respective counsel have also generally discussed the tax consequences of this agreement but both parties have been advised and understand that their counsel are not tax specialists. Each party has been advised to seek specific tax advice in connection with this agreement, and each party sought such independent advice as each has deemed necessary.

(5) Each party has carefully read this agreement and each is fully aware of its contents and legal effect.

B. Personal property division.

1. Starting points.

a. Equitable distribution.

b. Community property - divide equally.

2. Attach a schedule to provide the details of who gets what.

3. List bank accounts, CD's, etc. by owner, account number, institution, and approximate balance.

4. Consider a waiver clause for property not mentioned in the agreement (e.g., "Each party has independently determined to his or her satisfaction the extent of property owned by the parties jointly and individually. Each is satisfied that this agreement divides all property and assets that should be divided between the parties. Notwithstanding contrary provisions of law, any property, asset or expectancy, be it real or personal, tangible or intangible, vested or contingent, that is not addressed in this agreement is the separate property of the party who now owns or possesses it.")



If you are going to use a waiver clause, make sure you use a reliance on representations clause!

5. Tips on division of tangible personal property.

- a. The "tag sale" method.
- b. The auction method.

6. Military retired pay.

- a. Should the issue be addressed?
  - (1) Spouse - yes, even if only to preserve the matter for future resolution.
  - (2) Soldier - may be the soldier's greatest reason for wanting a separation agreement.
  - (3) Memorialize advice to the client if the matter is not raised.
- b. Provide advice on direct payment requirements (10 U.S.C. ' 1408)
- c. A common formula:

$$\frac{1}{2} \times \frac{[\text{Relevant length of marriage}]}{[\text{Relevant length of service}]} \times 100 = \text{spouse's percentage}$$

- d. Insulate former spouses against modifications or shortfalls in "Disposable Retired Pay" (DRP).
  - (1) Clarify intent is to divide DRP that is not reduced by VA disability, military disability, Dual Compensation Act, or civil service retirement waivers.

- (2) Provide by direct payment by member to make up shortfalls.
- (3) Direct member not to do anything that might decrease former spouses share.
- (4) Reserve jurisdiction to make adjustments should changes occur.

C. Child custody and visitation.

1. Joint vs. sole custody.
2. Describe visitation rights with some specificity.
3. Allocate travel expenses and responsibilities incident to exercise of visitation rights.
4. Sample provision:
  - a. Noncustodial parent shall have the right to have the child with him during the following visitation periods:
    - (1) The first weekend each month, from 5:00 p.m. on Friday until 5:00 p.m. on Sunday; however, if the following Monday is a holiday, the visitation period shall extend until 5:00 p.m. on Monday.
    - (2) For the month of July every summer.
    - (3) For a one week period each Christmas, and the period will include December 24 and 25 in each even-numbered year.
    - (4) For 4 days during spring school break in each odd-numbered year.

(5) Such other times as the parties may agree.

b. The parties agree that upon the child's attaining the age that air carriers will allow him to travel unaccompanied, he will use this means for visitation purposes. Noncustodial parent will bear all transportation costs incident to exercise of visitation rights except as follows:

(1) Custodial parent will be responsible for delivering the child to and picking the child up at the major commercial airport nearest her home.

(2) If custodial parent moves to a new location so that transportation costs are higher, she will bear the additional cost.

c. Noncustodial parents exercise of the rights of visitation under this agreement shall be optional with him, and his failure to exercise such rights on any occasion, for whatever reason, shall not be construed as a waive of future rights. However, any such unused visitation shall not accumulate.

5. Include an obligation to avoid disparaging the other parent in the child's presence (e.g., "Neither party will disparage or criticize the other party in the child's presence, and each party will ensure that other adults refrain from disparaging or criticizing the other party in the child's presence.")

#### D. Child Support.

1. Amount.

a. What amount, if any, have the parties determined for child support?

b. Check military service guidelines.

c. Review state or local child support guidelines.

- (a) Excessively low support amounts are self-defeating because the court may ignore this portion of the agreement.
- (b) Even when the agreement is to be incorporated into court decree, the court may be required to determine whether the amount of child support conforms to the state guidelines.

2. Health care expenses.

- a. Military medical care preferred for soldier but may not be convenient.
- b. Insurance.
  - (1) CHAMPUS
  - (2) Civilian insurance.
- c. Uncovered health care expenses (UHCE)
  - (1) Define what is health care - does it include psychological counseling? Orthodontia? Prescription drugs?
  - (2) Who pays for what? (Silence likely means the custodial parent will bear the burden.)

3. Termination - define "emancipation."

- a. Age.
- b. Education.

- (1) States may require support past age 18 if the child is still in high school. Some may include college expenses as well.
  - (2) Scrutinize support while children are in college - should this money go to the child or the custodial parent?
- c. Marriage (what about void or voidable marriages?).
- d. Residence outside the custodial parent's home.
- e. Military service.

E. Soldiers' and Sailors' Civil Relief Act Waiver

- 1. Purpose: expedite the court proceeding and help facilitate direct payment of retired pay to the former spouse.
- 2. Rights affected: see 50 U.S.C. App. ' 520, 521
- 3. Sample provision: "John hereby waives all rights and protection afforded by the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. " 501-548 and 560-591), and any state law providing similar rights and protections, in any proceeding brought by Martha to dissolve the parties' marriage, provided that Martha requests the court to [merge][ratify and incorporate] this agreement in any decree the court may render; that she seek no relief or remedy in addition to the provisions of the agreement or contrary to its provisions; and that the court does [merge][ratify and incorporate] this agreement in its decree and does not render any remedy or relief in addition to or contrary to the provisions in this agreement.

## V. CONCLUSION



# **CHAPTER J**

## **MILITARY TAX ISSUES**

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# MILITARY TAX ISSUES

## Outline of Instruction

### I. REFERENCES.

- A. Internal Revenue Code (I.R.C.) of 1986, as amended.
- B. Treasury Regulations.
- C. Various IRS Publications found at the Internal Revenue Service Home page ([www.irs.ustreas.gov](http://www.irs.ustreas.gov))
- D. CCH, 200X U.S. Master Tax Guide (annual).
- E. Prentice-Hall, Federal Tax Handbook (annual).
- F. JA 269, Tax Information Series (Dec. 2000).
- G. JA 275, Model Income Tax Assistance Guide (Jun. 1998).

Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.

*Judge Learned Hand*  
*Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934)*



## II. FEDERAL INCOME TAX OVERVIEW.

### COMPUTATION STEPS

#### ***GROSS INCOME***

Wages, salaries, tips;  
Dividends;  
Alimony received;  
Farm income;  
Unemployment compensation

Taxable interest income;  
State & local tax refunds;  
Business profits & losses;  
Social security benefits;  
Other income

**Capital gains & losses;**  
IRA distributions;  
Rents & Royalties;  
Pension & annuities

#### ***- ADJUSTMENTS***

**IRA deduction**

One-half self-employment  
Penalty on early withdrawal of savings

**Student loan interest deduction**

Alimony paid

Medical Savings Account  
Moving Expenses

**= ADJUSTED GROSS INCOME**

#### ***- DEDUCTIONS***

Standard Deduction or Itemized Deductions

Charitable contributions;  
Nonbusiness casualty & theft losses;

Taxes paid;  
Medical expenses;

Interest paid;  
Miscellaneous deductions

#### ***- EXEMPTIONS***

Taxpayer;

Spouse

Dependents;

**= TAXABLE INCOME**

#### ***TAX***

#### ***- TAX CREDITS***

Child & Dependent Care;  
**Child tax credit**  
Adoption Credit

Credit for elderly or disabled;  
**Additional Child tax credit**  
Earned income credit

**Education credits**  
Foreign tax credit

#### ***+ TAXES***

Self-employment tax;  
Household employment taxes  
Social security & Medicare tax on tip income not reported

Alternative minimum tax;  
Advance EIC payments from W-2

Recapture taxes;  
Tax on IRA;

#### ***- TAXES PAID***

**= FINAL TAX LIABILITY**

### **III. MILITARY TAX ASSISTANCE.**

A. Scope of Tax Assistance Services. The Army Tax Program is a command directed program. It is designed to provide Federal and State income tax return preparation assistance to service members, their family members, and retirees. The Tax Program is conducted with the cooperation of the Internal Revenue Service (IRS) under its Voluntary Income Tax Assistance Program (VITA).

1. Unit Tax Assistor Component.
2. Volunteer Tax Assistor Component.
3. Outreach Component:
4. Tax Center.
  - a. During the income tax preparation season, the Legal Assistance Office may staff a consolidated tax center under the supervision of the Tax Officer. The tax center is responsible for assisting service members, retirees, and family members in the preparation and electronic filing of federal and state tax returns.
  - b. The services rendered by Legal Assistance Attorneys will be within the limitations prescribed by AR 27-3 (i.e., the preparation of partnership or corporate tax returns or matters relating to producing business activities is not authorized).

B. General topics included in JA 275 (Model Income Tax Guide).

1. Guide to setting up a tax program.
2. Sample Standard Operating Procedures (SOP).
3. Tax Assistance milestones.

4. Action memorandums to get command support.
5. Requesting materials and IRS support.
6. Sample articles, announcements, and publicity.
7. Reports.
8. Electronic filing information.
9. Consolidated Tax Centers.
10. Combination of Tax Centers and UTAs.

C. Military Tax Law Training Schedule.

1. 03-07 December 2001: Air Force Tax Course, Maxwell AFB, Alabama.
2. 10-14 December 2001: Tax Law for Attorneys, TJAGSA.
3. 02-05 January 2002: Hawaii Tax Course, Schofield Barracks, HI
4. 07-11 January 2002: PACOM Tax Course, Yongsan, Korea.
5. 14-18 January 2002: . USAREUR Tax Course

#### **IV. WHEN TO FILE.**

- A. Federal income tax returns are due 15 April (Treas. Reg. § 1.6072-1(a)) (unless the 15th falls on a weekend/holiday).
- B. Overseas Extension (Treas. Reg. § 1.6081-5(a)(6)). Military personnel on duty outside U.S. or Puerto Rico on 15 April are allowed an automatic extension of two months (June 15) to file and pay tax (however, see below).
  - 1. If taxpayer files a joint return, only one spouse has to qualify for this automatic extension.
  - 2. Attach a statement to the return explaining what situation qualified the taxpayer for the extension.
  - 3. If a taxpayer uses the overseas extension and waits to pay any taxes due, they will be charged interest from the regular filing date.
  - 4. Attempts to legislatively fix this problem for the military (Uniform Filing Fairness Act) failed to be enacted in 1999/2000.

## **V. EXTENSION OF TIME FOR MILITARY PERSONNEL IN A COMBAT ZONE OR QUALIFIED HAZARDOUS DUTY AREA**

A. What is a Combat Zone (CZ) or Qualified Hazardous Duty Area (QHDA)?

1. Combat Zone (CZ).

- a. A CZ is an area that the President of the United States has designated by Executive Order in which the Armed Forces are or have engaged in combat. I.R.C. § 112(c)(2).
- b. Service members may invoke CZ tax relief only if they serve in a CZ on or after the date designated in the Executive Order.

2. Qualified Hazardous Duty Area (QHDA).

- a. Legislation creates a “qualified hazardous duty area.” The legislation will specify the date that members in the QHDA become eligible for tax relief.
- b. Members serving in a QHDA receive the same tax treatment under the Internal Revenue Code as members serving in a CZ. P.L. 104-117, § 1(a)(2), (b) and (e)(1), 109 Stat. 827 (1996).
- c. In the two QHDAs created by Congress, Congress has designated certain countries as QHDAs and has specified that each designated country will lose its status as a QHDA when the Department of Defense stops paying members either imminent danger or hostile fire pay for service in that country. In addition, Congress could also enact legislation terminating the QHDA.

B. How Does a Service Member Qualify for Service in a CZ or QHDA?

1. The service must be performed on or after the date of designation in the Executive Order issued by the President as the commencement date (or in the legislation in the case of the QHDA) and on or before the termination date in the Executive Order (or the date that members in that country stop receiving imminent danger/hostile fire pay in the case of the QHDA). I.R.C. § 112(c)(3).
2. Generally, to receive CZ tax benefits, a member must serve in a CZ or QHDA.
3. Service members outside of a CZ or QHDA receive CZ tax benefits when their service directly (as opposed to remotely or indirectly) supports military operations in the CZ upon the meeting of three basic conditions.
  - a. First, the direct support of military operations has to have the effect of maintaining, upholding, or providing assistance for those involved in military operations in the CZ (or QHDA). Treas. Reg. § 1.112-1.
  - b. Second, the service must qualify the service member for hostile fire pay or imminent danger pay. Treas. Reg. § 1.112-1.
  - c. Finally, the reason for payment of imminent danger or hostile fire pay must be based on the risks or dangers related to the QHDA or CZ. DoD Reg. 7000.14-R, "Financial Management Regulation," para 440103B.5 (July 1996). *See also*, Guidance, Office of the Assistant Secretary of Defense Force Management Policy (Military Personnel Policy), subject: Guidance for Requesting/Approving Combat Zone Tax Benefits for Service in "Direct Support" of Military Operations (22 April 1999).

C. Extension of Time for Tax Actions.

1. Soldiers qualifying for service in a designated CZ or QHDA are entitled to special extensions of time for completing various tax actions. The suspension of time applies to the following acts pursuant to I.R.C. § 7508(a)(1):
  - a. Filing any return of income, estate, or gift tax (except employment and withholding tax);
  - b. Payment of any income, estate, or gift tax (except employment and withholding tax) or any installment thereof or of any other liability to the United States in respect thereof;
  - c. Filing a petition with the Tax Court for redetermination of a deficiency, or for review of a decision rendered by the Tax Court;
  - d. Allowance of a credit or refund of any tax;
  - e. Filing a claim for credit or refund of any tax;
  - f. Bringing suit upon any such claim for credit or refund;
  - g. Assessment of any tax;
  - h. Giving or making any notice or demand for the payment of any tax, or with respect to any liability to the United States in respect of any tax;
  - i. Collection, of the amount of any liability in respect of any tax;
  - j. Bringing suit by the United States, or any officer on its behalf, in respect of any liability in respect of any tax; and

- k. Any other act required or permitted under the internal revenue laws specified in regulations prescribed under this section by the Secretary;
- 2. The deadline extension also applies to the filing of all tax schedules and forms that are attachments to the federal individual tax return.
- 3. Spouses of service members entitled to the CZ tax benefits are entitled to the same suspension of time for handling tax matters. I.R.C. § 7508(c).
- 4. The suspension of time encompasses the period of service in the CZ, as well as any time of continuous qualified hospitalization resulting from injury received in the CZ and the next 180 days thereafter. I.R.C. § 7508(a).
- 5. The additional time is disregarded in determining tax liability under the Internal Revenue Code (including interest, penalty, additional amount, or addition to tax). I.R.C. § 7508(a).
- 6. The IRS has determined that this extension runs consecutively, not concurrently, with the tax-filing season (tax filing season = 01 Jan. to 15 Apr.).
  - a. Consequently, soldiers serving in a CZ may be entitled to up to 105 additional days for a total CZ extension of 285 days to complete action on tax matters after leaving the CZ.
  - b. For example, a soldier serving in the CZ from 01 October 2001, until 1 May 2002, will have the full 285 days to file the 2001 tax return. This extension equals the 180-day extension, plus the full 105 days in the tax-filing season. Soldiers beginning service in the CZ after 1 January 2002, will not have the full extension period. For example, a soldier arriving in the CZ on 01 February 2002, and serving until 1 May 2002, will have 254 days. This period of time is equivalent to the full 180-day extension, plus the seventy-four days remaining in the filing season since 1 February 2000. *See* I.R.S. Notice 99-30, 1999-22 I.R.B. 1.



7. The CZ extensions also apply to individuals serving in the CZ in support of the U.S. Armed Forces. These include Red Cross personnel, accredited correspondents, and civilians acting under the direction of the U.S. Armed Forces in support of those forces (both Department of Defense civilian employees and civilian employees of defense contractors). I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #13.

D. Current CZs and QHDAs.

1. Operation Desert Storm (Persian Gulf Area) CZ.
  - a. President Bush signed an Executive Order on January 21, 1991, designating the Persian Gulf Area as a CZ. Exec. Order No. 12744, reprinted in, 56 Fed. Reg. 2661 (1991). The CZ designation is still open, and will remain open until terminated by another Executive Order. Service members serving in the Persian Gulf CZ are still eligible for the previously mentioned benefits.
  - b. The Executive Order designated the following locations within the CZ: the Persian Gulf; the Red Sea; the Gulf of Oman; the Gulf of Arden; that portion of the Arabian Sea that lies north of 10 degrees north latitude and west of 68 degrees east longitude; and the total land areas of Iraq, Kuwait, Saudi Arabia, Oman, Bahrain, Qatar, and the United Arab Emirates.
  - c. Service members serving outside of the CZ in direct support of the military operations within the Persian Gulf CZ under conditions which they are entitled to hostile fire pay are entitled to the CZ tax benefits.

2. QHDA of Bosnia, Herzegovina, Croatia and Macedonia (Operation Joint Forge)

a. Tax relief was legislatively extended to service members in the QHDA of Bosnia, Herzegovina, Croatia, or Macedonia if they are serving in those areas and receiving hostile fire or imminent danger pay. P.L. 104-117, § 1(a)(2), (b) and (e)(1), 109 Stat. 827 (1996).

(1) These areas were specifically designated as a QHDA and result in service members receiving all the federal tax benefits of a CZ as if it was designated by Executive Order by the President. All of the CZ tax benefits previously mentioned apply to this QHDA.

(2) Service members assigned outside of the QHDA in direct support of the military operations within this designated QHDA under conditions which they are not entitled to hostile fire pay are entitled to very limited CZ tax benefits. Service members who are performing services as part of the operation outside of the United States while deployed away from their permanent duty stations in support of the QHDA are allowed an extension of time allowed for performing most acts required by the Internal Revenue Code. I.R.C. § 7508. This was the only CZ tax provision extended to these individuals. P.L. 104-117, § 1(a)(2), (b) and (e)(1), 109 Stat. 827 (1996).

b. On 20 June 1998, Operation Joint Guard was terminated and Operation Joint Forge commenced. Operation Joint Forge is a follow-on operation to Operation Joint Guard, which was a follow-on operation to Operation Joint Endeavor.

- c. Service members serving in the geographic area of this QHDA are not affected by a change of the name of the operation. The IRS has stated that personnel serving under Operation Joint Forge will be treated that same as personnel serving under Operation Joint Endeavor since Operation Joint Forge is the substantive continuation of Operation Joint Endeavor. *See*, Letter from Tommy G. Deweese, District Director for the International District, Internal Revenue Service, to Lieutenant Colonel Thomas K. Emswiler, Armed Forces Tax Council, Department of Defense (17 July 1998), cited in footnote 6, Joint Committee on Taxation, (JCX-17-99) (Apr. 12, 1999), a description of present law and a proposal relating to tax relief for personnel in the Federal Republic of Yugoslavia (Serbia/Montenegro), Albania, the Adriatic Sea, and the Northern Ionian Sea. *Also see* Information Paper, Office of the Judge Advocate General, U.S. Army, DAJA-LA, subject: Operation Joint Forge Tax Treatment (15 Sep 1999)  
<http://www.jagcnet.army.mil/JAGCNETIntranet/Databases/Legal%20Assistance/lalaw1.nsf/bd20b7a502addee7852568f500506f8c/f37060003523b642c12567ef00548436!OpenDocument&Highlight=0,bosnia> ; Major Mark Henderson, *Tax Law Note, Bosnian Tax Relief*, ARMY LAW., May 1996 at 27.
- 3. Operation Allied Force CZ (Federal Republic of Yugoslavia (Serbia/Montenegro), and Albania).
  - a. On April 13, 1999, President Clinton issued an Executive Order designating a CZ for the area of the Federal Republic of Yugoslavia (Serbia/Montenegro), Albania, the Adriatic Sea, the Ionian Sea north of the 39<sup>th</sup> parallel, including the airspace above the locations. Exec. Order No. 13,119, 64 Fed. Reg. 18797 (April 16, 1999); IR-1999-43,  
<http://www.jagcnet.army.mil/JAGCNETIntranet/Databases/Legal%20Assistance/lalaw1.nsf/bd20b7a502addee7852568f500506f8c/83eea93afcc77b4885256755003df157!OpenDocument&Highlight=0,bosnia>. The Executive Order designated March 24, 1999 as the date of commencement of activities in the CZ.

- b. Service members serving outside of the CZ in direct support of the military operations within the Operation Allied Force Combat Zone under conditions which entitled them to hostile fire pay are entitled to the CZ tax benefits.
  - c. The CZ designation is still open, and has not been terminated by another Executive Order. Service members serving in the Operation Allied Force CZ are still eligible for the previously described benefits.
- 4. Operation Allied Force QHDA (Federal Republic of Yugoslavia (Serbia/Montenegro), and Albania)
  - a. President Clinton signed legislation designating a QHDA on April 19, 1999, for the area of:
    - (1) The Federal Republic of Yugoslavia (Serbia/Montenegro), Albania, the Adriatic Sea, the northern Ionian Sea above the 39<sup>th</sup> parallel during the period that a service member is entitled to hostile fire or imminent danger pay for service performed in the designated area. The Act is generally effective as of March 24, 1999. P.L. 106-21, 113 Stat. 34 (1999).
    - (2) The areas mentioned were specifically designated as a QHDA and result in service member's entitlement to all the tax benefits of a CZ as if it was designated by Executive Order by the President. All of the CZ tax benefits apply to the specified geographic locations of the QHDA.

- (3) Service members serving outside of the CZ in direct support of the military operations within this designated QHDA under conditions for which they are not granted hostile fire pay are entitled to very limited CZ tax benefits. Service members who are performing services as part of the operation outside of the United States while deployed away from their permanent duty stations in support of the QHDA are allowed an extension of time allowed for performing most acts required by the Internal Revenue Code. I.R.C. § 7508. This was the only CZ tax provision extended to these individuals. P.L. 106-21, 113 Stat. 34 (1999).
- b. The area of operations for Operation Allied Force has been designated as both a CZ by Executive Order and a QHDA by specific legislation.
  - (1) Generally, the two provide the same tax benefits, but the QHDA provides that service members performing services outside of the areas, but still a part of Operation Allied Force would qualify for the suspension of time to perform various tax acts. (I.R.C. § 7508) during the periods in which they are not paid hostile fire or imminent danger pay provided the services are performed both outside the United States and while deployed away from the service member's permanent duty station. P.L. 106-21, 113 Stat. 34 (1999); Joint Committee on Taxation, (JCX-17-99) (Apr. 12, 1999).
  - (2) The CZ designation for Operation Allied Force will remain open until terminated by another Executive Order. Likewise, the QHDA will remain in effect until terminated by Congress or the IRS determines that any future follow-on operation is not a substantive continuation of the QHDA.

- (3) Although the Operation Allied Force area of operations is commonly referred to as the Operation Allied Force CZ, Judge Advocates must not forget that the area has been designated a CZ and a QHDA. In the event one of the designations is terminated in the future, relief may still be available under the rules of the other designation.

E. Filing Tax Returns for CZ Participants

1. Service members who qualify for extensions of time to file federal tax returns pursuant to the CZ extensions can file their returns in accordance with the filing extensions previously mentioned. In addition, the service member can elect to file their return before the end of the extension period.
2. Service members in a CZ can authorize someone else to file their taxes in their absence by executing a special power of attorney, a general power of attorney, or the IRS Form 2848 (Power of Attorney and Declaration of Representative). When someone will act on behalf of a service member to file a tax return using a power of attorney, the form, or a copy of the power of attorney must be attached to the tax return.
3. Service members using a CZ or QHDA extension to file any type of tax form should write the name of the CZ or QHDA at the top of any tax return, reply notice, or other correspondence sent by the IRS (i.e., “Operation Desert Storm Combat Zone”, “Operation Joint Forge Combat Zone”, “Operation Allied Force Combat Zone”). IR-1999-43, <http://ftp.fedworld.gov/pub/irs-news/ir-99-43.pdf>.
4. There are many resources available to Judge Advocates to use as preventive law handouts to service members on how to “invoke” the CZ extensions and properly notify the I.R.S. (and other taxing authorities) of the CZ application. See, Tax Relief for those Affected by Operation Allied Force, Internal Revenue Bulletin 1999-22 IRB 1; Notice 99-30, a copy of which can be found at <http://ftp.fedworld.gov/pub/irs-irbs/irb99-22.pdf> ; I.R.S. Publication 3, Armed Forces Tax Guide, <http://ftp.fedworld.gov/pub/irs-pdf/p3.pdf>.

F. State Taxation Implications of CZ Designations.

1. Generally, most states follow the federal government's lead in granting tax relief for service members in a CZ or QHDA. However, the manner in which the various states reach that determination, the amount of exclusion, and the amount of time extended to handle tax matters and file tax returns varies from state to state.
  - a. Some states have enacted legislation, which in effect adopts the applicable sections of the federal Internal Revenue Code dealing with CZ extensions, exclusions and other benefits. Other states enact specific legislation dealing with each CZ or a QHDA designation.
  - b. The states are very diverse in the treatment of penalties and interest. Some states "waive" penalties and interest during the combat zone extension period. Other states "abate" or "forgive" penalties and interest during the combat zone extension period. A few states simply state in policy guidance that service members will not be charged interest and penalties during the CZ extension period. Some states simply do not provide explicit guidance regarding the treatment of interest and penalties.
2. While most states follow the lead of the federal government in providing CZ tax relief, the Judge Advocate should avoid providing general tax advice that "all states follow the federal government CZ tax rules." The advice could lead to false assumptions that are contrary to applicable state laws. Judge Advocates should also be aware of the legal basis for a states' CZ tax rules (based upon state statutes, administrative codes, and policy guidance) before providing tax advice to service members regarding individual state CZ tax rules.
3. An article appears in the December 1999 *Army Lawyer* which summarizes state CZ tax rules.

## **VI. GROSS INCOME (FORM 1040, LINES 7-22).**

### **A. General Principles.**

1. Income includes "all income from whatever source" (I.R.C. § 61).
2. The person who earns income and is entitled to receive it cannot avoid tax by assigning it to another.

### **B. Gross Income Items.**

1. All forms of compensation for services, including wages, salaries, fees, commissions, bonuses, termination pay, and severance pay. Specifically, for service members, the following items are included in gross income (also see Appendix A):
  - a. Basic pay.
  - b. Special pay - sea duty, diving, medical and dental officer pay, proficiency pay, hazardous duty pay, imminent danger pay, accrued leave payment, foreign duty pay, continuation pay (including JAGC Continuation Pay), flight duty, and Aviation Career Incentive Pay.
  - c. Bonuses - enlistment and reenlistment bonuses, overseas extension bonus, separation pay, and student loan repayments.
  - d. Personal money allowances (General Officer).



2. Pensions and annuities (Form 1040, line 16).
  - a. Generally reported to the taxpayer on Form 1099-R.
  - b. Pensions and retirement allowances are generally taxable to the recipient (Treas. Reg. § 1.61-11(a)). Armed Forces retirement pay based on length of service is taxable.
  - c. Members of the armed forces are able to exclude disability pensions if the payments are provided by the Department of Veterans Affairs (38 U.S.C. § 5301).
    - (1) Those eligible are individuals with service-related injuries or sickness. While armed forces retirement pay based on length of service is taxable, that pay is excludable to the extent it could be received as a disability compensation. *See also*, Priv. Ltr. Rul. 2000-07-018 (Nov. 18, 1999).
    - (2) If a taxpayer retires from the armed services and at a later date are given a retroactive service connected disability rating by the VA, and file a waiver for reduction of retirement pay in an amount equal to the VA disability compensation, the taxpayer does not include in income for the retroactive period the part of retirement pay he would have been entitled to receive from the VA during that period.
    - (3) A VA disability determination does not convert a military service retirement into a disability pension. The retiree has the burden of proving that pension payments that are received for a disability are incurred during active service in the military. *Scarce v. Commissioner*, 17 T.C. 830, 833 (1951).

(4) In some cases, a military retiree applies for disability benefits after retirement. Based upon the percentage disability determined by the VA, the retiree can elect to waive years of service retirement benefits to the extent of the VA benefits so that they can receive the VA benefits tax-free. In these cases, DFAS should make a reduction of retirement pay by the amount waived to receive the VA benefit. If DFAS makes this reduction properly, the retiree cannot exclude a second amount of retired pay on account of the same disability. Proper reporting by DFAS will exclude the VA benefits from the retirement pay on Form 1099-R. *Dale C. Holt, et ux. v. Commissioner*, T.C. Memo. 1999-348, No. 187-98 (1999).

d. A taxpayer does not include in income disability payments received for injuries resulting directly from a violent attack that occurs on a U.S. government employee performing official duties outside the U.S. For disability payments to be tax exempt, the Secretary of State must determine the attack was a terrorist attack. I.R.C. § 104(a)(5).

3. Gross income includes income from the discharge of indebtedness (I.R.C. § 61(a)(12)), unless discharged in Bankruptcy - Title 11 U.S.C. Section 32, or discharge results from an agreement among creditors if immediately thereafter the taxpayer's liabilities exceed value of assets (Treas. Reg. § 1.61-12(b)). The taxpayer should receive a 1099-C indicating the amount of income from discharge of an indebtedness.

## **VII. ITEMS EXCLUDED FROM GROSS INCOME.**

### **A. Military Benefits (see Appendix A of this outline).**

#### **1. Gross income does not include "qualified military benefits" (I.R.C. § 134(a)).**

a. Defined as any allowance or in-kind benefit received by a member or former member of the uniformed services of the U.S., or his dependent, and which was excludable from gross income on Sept. 9, 1986, under any provision of law or regulation (other than the Internal Revenue Code) in effect on that date (I.R.C. § 134(b)).

b. Excludable benefits: veteran's benefits, medical benefits, professional education, group term life insurance, survivor and retirement protection plan premiums, subsistence, uniform, housing, overseas cost-of-living, evacuation, family separation allowances, death gratuities, interment allowances, various travel allowances, tuition assistance and dependent benefits (I.R.C. § 134(b))

(1) Dislocation allowances, temporary lodging allowances and expenses, move-in housing allowances provided in connection with permanent changes of station are excludable from income (Treas. Reg. § 1.61-2(b)(2)).

(a) Transportation allowances. The cost of transporting families and dependents paid by the government is not includable in gross income for the transfer is in the interest of the government and not for the benefit of the servicemember. Any excess of the allowance or reimbursement over the actual expenses incurred for such purposes is includable in gross income. Rev. Rul. 54-429, 1954-2 C.B. 53.

- (b) Dislocation allowance. 37 U.S.C. § 407; 26 C.F.R. § 1.61-2(b)(2).
  - (c) Temporary lodging allowance (37 U.S.C. § 405) or expense (37 U.S.C. § 404a); 26 C.F.R. § 1.61-2(b)(2).
- (2) Per Diem. Members of Armed Forces receiving per diem allowances are considered as having accounted to their employer for their travel and other business expenses and as such, the allowances are not taxable. I.R.C. § 134; Priv. Ltr. Rul. 59-01-205 (Jan. 20, 1959).
- (3) Family separation allowances. Rev. Rul. 70-281, 1970-1 C.B. 16; 26 C.F.R. § 1.61-2.
- (4) Uniform gratuity or clothing allowance. 26 C.F.R. § 1.61-2(b).
- (5) Death gratuity.
  - (a) If death occurred on or before 20 August 1996, recipient can exclude \$5,000 from gross income.
  - (b) If death occurred after 20 August 1996, recipient can only exclude \$3,000 from gross income.

2. Exclusion of Compensation of Service Members Received in a Combat Zone (CZ) or Qualified Hazardous Duty Area (QHDA) from Gross Income.

- a. Under the CZ/QHDA compensation exclusion tax rules, gross income does not include certain CZ/QHDA compensation of members of the Armed Forces. I.R.C. § 112.
- b. Any official presence in a CZ/QHDA during the month will qualify the service member for the CZ/QHDA exclusion for the entire month. Likewise, if a service member is hospitalized outside of the CZ/QHDA for part of a month as a result of wounds, disease, or injury incurred while serving in a CZ/QHDA, he qualifies for the CZ/QHDA exclusion for the full month so long as combatant activities remain in the CZ/QHDA. Treas. Reg. § 1.112-1(b)(3).
  - (1) Enlisted personnel serving in a CZ/QHDA during any part of any month may exclude from gross income all compensation received for active service for that month. I.R.C. § 112.
  - (2) The same compensation exclusion rule applies to commissioned officers (the term commissioned officer does not include a commissioned warrant officer, I.R.C. § 112(c)(1)) however, the exclusion from income is limited to the “maximum enlisted amount.” I.R.C. § 112(c)(5).
    - (a) “Maximum enlisted amount” means the highest rate of basic pay for such month to any enlisted member of the Armed Forces of the United States at the highest pay grade applicable to enlisted members plus the amount of hostile fire or imminent danger pay to an officer for the month.

- (b) For 2001, commissioned officers may exclude up to \$5,043 each month during any part of which they served in a CZ/QHDA. This represents the \$4,893 payable monthly to the Sergeant Major of the Army and to the other senior enlisted advisors of the other services plus \$150.00 for imminent danger/hostile fire pay. For 2001, commissioned officers may exclude up to \$X,XXX [Pay Table Not Yet Released] each month plus \$150 for imminent danger/hostile fire pay (\$X,XXX).
- c. Student Loan Repayment Made on Behalf of Service Members in a CZ/QHDA.
  - (1) An issue that arises periodically concerns the taxability of student loan repayments made on behalf of service members in a CZ/QHDA as part of the Department of Defense Loan Repayment Program.
  - (2) Generally, a loan repayment under the program is compensation for services, but it is excluded as CZ/QHDA compensation for the months in the CZ/QHDA. Letter, Department of the Treasury, Internal Revenue Service, Office of Associate Chief Counsel (Employee Benefits & Exempt Organizations), to Lieutenant Colonel Thomas K. Emswiler, Deputy Chief, Legal Assistance Policy Division, Office of the Judge Advocate General, U.S. Army (12 Dec. 1997).
  - (3) If a service member serves one or more days in a CZ/QHDA during a particular month, and is able to exclude compensation for that month as CZ/QHDA compensation, the service member is also entitled to exclude 1/12 of the loan repayment corresponding to that month's service.

d. Separation Payments to Leave the Military Accruing While a Service Member is in a CZ/QHDA.

- (1) Compensation earned in a CZ/QHDA does not include pensions and retirement pay. I.R.C. § 112(c)(4).
- (2) Similarly, the Fourth Circuit Court of Appeals ruled that a separation payment for an agreement to leave military service early in lieu of retirement, which accrues while the service member is on active duty in a CZ/QHDA, does not constitute compensation for active service in a CZ/QHDA, and is not excluded from gross income under the CZ/QHDA pay exclusion. A separation payment is not a payment for service in a CZ/QHDA, but rather in exchange for an agreement to leave military service early and forego any right to pension benefits. Therefore, separation payments do not fall within the CZ/QHDA compensation rules. The time and place of acceptance of the separation payment are irrelevant to this determination. Waterman v. Commissioner, 179 F.3d 123 (4th Cir. 1999).

3. Exemption from Telephone Excise Tax

- a. An excise tax is imposed on telephone or communications services, which are generally a percentage of amounts paid for the services. I.R.C. § 4251(a). The person paying for the communication services normally pays the tax.
- b. The telephone excise tax is not imposed on any toll telephone service originating in a CZ/QHDA that is made by a service member. I.R.C. § 4253(d).

- (1) If a service member uses a calling card or makes a collect call from a CZ/QHDA, a certificate of exemption must be furnished to the telephone service provider receiving payment for the call. The certificate, which is obtainable from the telephone service provider, should contain the signature and date of the telephone subscriber. The certificate should contain the amount, the point of origin of call, the name of the service member in the CZ/QHDA, the name of the telephone service provider, and a statement that the charges are exempt from tax under I.R.C. § 4253(d). *See*, I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #30.
  - (2) If there has been a payment of the federal excise tax for telephone services, a refund may be obtained either from the telephone service provider that collected the tax, or from the IRS by filing Form 8849 and providing an exemption certificate. I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #31.
4. While the service member is entitled to the CZ/QHDA exclusion, income tax withholding does not apply to the excludable compensation. I.R.C. 3401(a)(1). DFAS does not report these amounts to the I.R.S. on Form W-2 as “Wages, tips, other compensation.”
5. Military pay for CZ/QHDA service is still subject to Social Security and Medicare taxes. The Form W-2 will report the excluded military pay in the boxes indicated “Social Security wages” and “Medicare wages and tips.” It will also show the excluded amount in block 13, as a code Q item. Code Q represents military employee basic quarters, subsistence, and CZ/QHDA compensation. Compensation for active service includes basic pay and certain other forms of compensation.



6. The other types of compensation excluded under the rules include pay for accrued leave earned in any month served in a CZ/QHDA (Treas. Reg. § 1.112-1(b)(5), Example 2; I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #6); a reenlistment bonus if the voluntary extension or reenlistment occurs in a month served in a CZ/QHDA (Treas. Reg. § 1.112-1(b)(4), and (5) Example 5, 6); and awards for suggestions, inventions, or scientific achievements members are entitled to because of a submission they made in a month they served in a CZ/QHDA (Treas. Reg. § 1.112-1(b)(5), Example 4).
7. Service in direct support of military operations in a CZ/QHDA by performance of military service in an area outside the CZ/QHDA, results in the service member receiving CZ/QHDA tax benefits if they are receiving hostile fire or imminent danger pay. Service members meeting the criteria receive the same CZ/QHDA compensation exclusion benefits as individuals serving in the CZ/QHDA. Treas. Reg. § 1.112-1(e).
8. Tax Benefits for Service Members Missing in Action (MIA) or Prisoners of War (POW).
  - a. A service member who becomes a POW or is MIA is considered to remain in active service in a CZ/QHDA. The period of service in a CZ/QHDA includes the period of time during which a service member is entitled to benefits pursuant to their status as missing. I.R.C. § 6013(f)(3). I.R.C. § 7508(d).
  - b. A service member is in a “missing status” when he is officially carried or determined to be absent in a status of missing, missing in action, interned in a foreign country, captured, beleaguered, or besieged by a hostile force; or detained in a foreign country against his will and is entitled to continued pay and allowances based upon the missing status. 37 U.S.C.A. § 551(2); 37 U.S.C.A. § 552.

- c. Generally, the CZ/QHDA compensation exclusion rules apply only if the service member performs active service in a CZ/QHDA. Periods during which the service member is absent from duties because of internment by the enemy, or other lawful cause will be considered periods of active service. I.R.C. § 112; Treas. Reg. § 1.112-1(b)(1). A service member in a CZ/QHDA who becomes a POW or MIA is deemed to continue in active service in the CZ/QHDA for the period for which the service member is treated as a POW or as MIA for military pay purposes. Therefore, the CZ/QHDA pay exclusion rules previously mentioned will be applicable to a service member that is MIA or a POW as a result of their time in the CZ/QHDA.

9. Death while Serving in a CZ/QHDA

- a. A service member who dies while in a CZ/QHDA is entitled to an abatement of the income taxes for the tax year in which the death occurs. I.R.C. § 692(a). The abatement also applies if the death occurred as a result of wounds, disease or injury incurred while serving in a CZ/QHDA.
- b. The income tax liability of a deceased service member is canceled for the last taxable year, ending on the date of death. The income tax liability is also canceled for any prior taxable year ending on or after the first day the service member served in a CZ/QHDA. I.R.C. § 692(a)(1); Treas. Reg. § 1.692-1(a)(2)(I). Upon the death of a service member as stated above, the service member will not be assessed any amount of income tax for prior taxable years. I.R.C. § 692(a)(2); Treas. Reg. § 1.692-1(a)(3).
- c. A service member who dies in a CZ/QHDA is entitled to forgiveness of taxes for previous years in which the statute of limitations is still open. I.R.C. § 692(a)(2). The survivor is entitled to a refund of any taxes paid by the deceased service member in prior years for which the service member, if alive, could file an amended return. Generally, an individual can only file an amended return for three years. I.R.C. § 6511(a).

- (1) For example, if a service member were to die in a CZ/QHDA in 2001, taxes owed or paid by that individual for 1998, 1999, 2000, and 2001 would be forgiven, provided that the survivor files the appropriate returns prior to 15 April 2002. If the survivor fails to file an amended return by 15 April 2001, the survivor could still receive a refund for tax paid by the decedent in 1999, 2000, and 2001, provided that the survivor files the appropriate returns prior to 15 April 2002.
- (2) To claim the refund, the surviving spouse needs to file a Form 1040, or a 1040X if it is an amended return with the Internal Revenue Service . Rev. Proc. 85-35, 1985-2 C.B. 433. In addition, Form 1310 and a certification from the Department of Defense or the Department of State that the death was the result of terrorist or military action outside the United States must be attached. If the return in question is for a joint return, an apportionment must be done between the decedent's income and the surviving spouse's income. *See* Treas. Reg. § 1.692.1(b); Rev. Rul. 85-103, 1985-2 C.B. 176; Major Mark Henderson, *Tax Law Note, Assisting Survivors When Spouse Died in a Combat Zone*, ARMY LAW., May 1997, at 68.
- (3) The survivor will also be entitled to a refund of any income taxes that were withheld from the service member's income during the tax year in which the service member died. If there is or has been an assessment of unpaid tax, there is an abatement of the assessments. In addition, if the amount of unpaid tax was collected after the date of death of the service member, the amount collected will be credited or refunded as an overpayment.

- d. Where a service member has filed a joint return with his spouse, the tax abated, credited, or refunded will be prorated as a portion of the joint tax liability. The amount abated, credited, or refunded shall be an amount equal to the portion of the joint tax liability which is the same percentage of the joint tax liability as a tax computed upon the separate income of the service member is the sum of the tax computed upon the separate income of the service member and his spouse. Treas. Reg. § 1.692-1(b).
- e. If the service member was in a missing status, the date of the death will be considered to be the date on which there has been a determination of death made. I.R.C. § 692(b). However, there will not be a forgiveness, abatement, or refund of taxes beginning more than two years after the date of termination of combatant activities. I.R.C. § 692(b)(2). Therefore, where a service member has been MIA in a CZ/QHDA and is found to have died in an earlier year, the surviving spouse is allowed to treat the date of death as either the date on which the official determination is made that the service member died, or the date two years after combatant activities in the CZ/QHDA have terminated, whichever is earlier. I.R.C. 2 (a)(3); Rev. Rul 76-468, 1976-2 CB 202.

10. Tax Consequences of Military Survivor Benefits Attributed to Death in a CZ/QHDA

- a. Dependency and Indemnity Compensation (DIC). DIC is not taxable as income to the recipient. I.R.C. § 134(b).
- b. Survivor Benefit Plan (SBP). Compensation earned in a CZ/QHDA does not include pensions and retirement pay. I.R.C. § 112(c)(4). The payments to the beneficiaries under SBP are taxable as ordinary income despite the death occurring in a CZ/QHDA. I.R.C. § 72(a), (n).
- c. Servicemen's Group Life Insurance (SGLI). It is excluded from federal income taxation. I.R.C. § 101(a).

B. Foreign Earned Income Exclusion (I.R.C. § 911; IRS Publication 54, Tax Guide for U.S. Citizens and Resident Aliens Abroad).

1. General.
2. Armed Forces assigned to NATO may not elect the foreign earned income exclusion for military compensation.
  - a. The IRS has concluded that service members assigned to NATO are employees of the U.S. and are ineligible to elect the exclusion of foreign earned income under I.R.C. § 911.
  - b. The IRS noted that a service member is assigned to NATO by the U.S. and performs services at NATO as a member of the U.S. military. Because the U.S. provides the member with benefits, pays the member's salary, and issues a Form W-2, the service member is an employee of the U.S. and, therefore, cannot take the foreign earned income exclusion.
  - c. References:
    - (1) Fact sheet on JAGCNET:  
<http://www.jagcnet.army.mil/JAGCNETIntranet/Databases/Legal%20Assistance/lalaw1.nsf/c317180a11767f0785256499006b15a3/086f757beb048d5dc12567fa004a7fe2!OpenDocument&Highlight=0,adair>
    - (2) *Tax Notes Today*, September 20, 1999, 1999 TNT 181-53..

C. Other Exclusions.

1. Property received as a gift, bequest, devise, or inheritance is excluded (I.R.C. § 102(c); Treas. Reg. § 1.102-1).
2. Child support (I.R.C. § 71).

## VIII. TAX CONSEQUENCES OF SELLING A HOME.

### A. Gain or Loss on the Sale of a Personal Residence.

1. Gain derived from the sale of a personal residence is taxable unless deferred or excluded. Generally must be reported in year of sale. If the sale occurred on or after May 7, 1997 and the taxpayer elects to treat the sale under revised section 121, the taxpayer need not report the sale if the selling price was under \$250,000 (\$500,000 if married), the home was the taxpayer's principal residence, the entire amount is excludable under revised section 121, and the real estate reporting person certifies these facts on an information return to the Internal Revenue Service. I.R.C. § 6045 as amended by the tax Reform Act of 1997.
2. Losses sustained on the sale of a personal residence are nondeductible (I.R.C. § 165, Reg. § 1.165-9).
  - a. If a residence is converted to rental property, a loss will be allowed, but the taxpayer must compute the amount of the loss from the lesser of the adjusted basis or the fair market value at the time of the conversion (Reg. § 1.165-9).
  - b. Taxpayer has option to elect out of section 121. Allows taxpayer to treat an otherwise qualifying property as a rental. (I.R.C. § 121(f)).

### B. Exclusion of Gain (I.R.C. § 121). Gross income does not include gain from the sale or exchange of property if, during the five year period ending on the date of the sale or exchange, the property had been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating two years or more (I.R.C. § 121(a)).

1. The two-year period of use need not be continuous (IRS Pub 17 (1998)).
2. The taxpayer may meet the *ownership* and *use* tests during two different two-year periods (IRS Pub. 17 (1998)).

C. Dollar Limitations.

1. \$250,000 (I.R.C. § 121(b)(1)).
2. \$500,000 exclusion for joint filers. In the case of a husband and wife who file a joint return for the tax year of the sale or exchange of the property, the \$250,000 limitation is increased to \$500,000 if: (I.R.C. § 121(b)(2)(A)),
  - a. Either spouse meets the *ownership* requirements described in section 121(a) with respect to the property (I.R.C. § 121(b)(2)(A)(i)),
  - b. Both spouses meet the *use* requirements described in section 121(a) with respect to the property (I.R.C. § 121(b)(2)(A)(ii)), and
  - c. Neither spouse is ineligible for the benefits of the exclusion with respect to the property by reason of the one sale every two years rule contained in section 121(b)(3) (I.R.C. § 121(b)(2)(A)(iii)).
3. Dollar limitations for married couples who file a joint return and do not qualify for the \$500,000 limitation. In the case of a husband and wife who make a joint return for the year of sale or exchange and who do not meet the requirements for the \$500,000 exclusion, the amount of gain eligible for the exclusion is the sum of the amounts to which each spouse would be entitled if the spouses had not been married. For purposes of this rule, each spouse is treated as owning the property during the period that either spouse owned the property (I.R.C. § 121(b)(2)(B)). Thus, if a married couple filing a joint return does not qualify for the \$500,000 maximum exclusion, the amount of the maximum exclusion that may be claimed by the couple is the sum of each spouse's maximum exclusion determined on a separate basis.

- D. Two-Year Rule. The exclusion of gain from the sale or exchange of a principal residence does not apply to any sale or exchange by the taxpayer if, during the two-year period ending on the date of the sale or exchange, there was any other sale or exchange by the taxpayer to which the exclusion applied (I.R.C. § 121(b)(3)(A)).

1. The use of the exclusion is generally limited to one sale every two years.
  2. This limit of one sale every two years is applied without regard to sales before 7 May 1997 (I.R.C. § 121(b)(3)(B)).
  3. If a single taxpayer who is otherwise eligible for an exclusion marries someone who has used the exclusion within the previous two years, the newly married taxpayer is allowed a maximum exclusion of \$250,000 (H Rept. No. 105-148).
  4. The rule limiting the exclusion to one sale every two years by the taxpayer does not prevent a husband and wife filing a joint return with each excluding up to \$250,000 of gain from the sale or exchange or each spouse's principal residence provided that each spouse would be permitted to exclude up to \$250,000 of gain if they filed separate returns (Conf Rept No. 105-220).
- E. Reduced Exclusion. Certain taxpayers who fail to meet the ownership requirements or who have sold or exchanged principal residences within two years may qualify for a reduced exclusion.
1. Sales and exchanges eligible for the reduced exclusion. The reduced exclusion applies to any sale or exchanges if:
    - a. the exclusion would not (but for these rules relating to the reduced exclusion) apply to the sale or exchange by reason of:
      - (1) a failure to meet the ownership and use requirements (I.R.C. § 121(c)(2)(A)(i)), *or*
      - (2) the limit of only one sale every two years (I.R.C. § 121 (c)(2)(A)(ii)), *and*
    - b. the sale or exchange is by reason of a change in place of employment, health, or unforeseen circumstances. (I.R.C. § 121(c)(2)(B)).



2. Amount of the reduced exclusion. For taxpayers subject to the reduced exclusion, the dollar limitation (either \$250,000 for single taxpayers or \$500,000 for certain joint filers) is equal to:

a. the amount which bears the same ratio to the dollar limitation (\$250,000 or \$500,000), (I.R.C. § 121(c)(1)(A))  
*as*

b. *the shorter of:* (I.R.C. § 121 (c)(1)(B)(i))

(1) the aggregate periods, during the five year period ending on the date of the sale or exchange, the property has been owned and used by the taxpayer as the taxpayer's principal residence, (I.R.C. § 121 (c)(1)(B)(i)(I)) *or*

(2) the period after date of the date of the most recent earlier sale or exchange by the taxpayer to which the exclusion applied and before the date of the sale or exchange (I.R.C. § 121 (c)(1)(B)(i)(II))

c. bears to two years (I.R.C. § 121 (c)(1)(B)(i)(II), I.R.C. § 121(c)(1)).

F. Recapture of depreciation. Gain attributable to depreciation taken after May 6, 1997 is not excludable under section 121. (I.R.C. § 121(d)(6)).

G. Reporting gain under section 121. A taxpayer who sells a residence for less than \$250,000 (\$500,000 for married taxpayers) need not report the transaction to the IRS if the company responsible for reporting the transaction certifies to the IRS that the taxpayer satisfies the requirements of section 121 and that the full amount of the gain is excludable. (I.R.C. § 6045(e)(5)).

## **IX. ADJUSTMENTS TO INCOME**

A. Student Loan Interest Deduction. (Form 1040, line 24.)

1. Taxpayers are entitled to a deduction (above the line) for interest paid during the first sixty months (even if loan repayments began before 1998) in which interest is required to be paid on an educational loan. A loan and any refinancings are treated as one loan. I.R.C. § 221.
  - a. The 60-month period commences with the month in which a loan first enters mandatory repayment status and continues to elapse regardless of whether payments are actually made, unless the repayment period is suspended for a period of deferment or forbearance.
  - b. The 60-month repayment period may expire at different times for different loans of the same borrower.
  - c. The date on which a qualified education loan enters repayment status is determined by reference to the loan agreement or the federal regulations governing the applicable federal postsecondary education loan program.
  - d. The 60-month period is suspended for any period when interest payments are not required on a qualified education loan because the borrower has been granted a deferment or forbearance (including postponement in anticipation of cancellation).
2. The maximum deduction allowed is \$2,500 in 2001 and thereafter.
3. The deduction is phased out from \$60,000 to \$75,000 for joint filers and \$40,000 to \$55,000 for all others (I.R.C. § 221(b)(2)(C)).
4. The student loan interest deduction may be claimed only by a taxpayer that is legally obligated to make the interest payments pursuant to the terms of the loan.
5. An eligible student is one who:

- a. Is enrolled in a degree, certificate, or other program (including a program of study abroad that is approved for credit by the institution at which the student is enrolled) leading to a recognized educational credential at an eligible education institution, and
  - b. Is carrying at least one-half the normal full-time workload for the course of study the student is pursuing.
- 6. A person who is claimed as a dependent on another's tax return cannot claim the education interest deduction (I.R.C. § 221(c)).
- 7. Married couples must file joint returns to take the deduction (I.R.C. § 221(f)(2)).
- 8. A qualified higher education loan is any debt incurred to pay qualified higher education expenses that are:
  - a. Incurred on behalf of the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer as of the time the debt is incurred,
  - b. Paid or incurred within a reasonable period of time before or after the debt is incurred, and
  - c. Attributable to education furnished during a period when the recipient was an eligible student (at least half-time student) (I.R.C. § 221(e)).
- 9. A qualified education loan includes debt used to refinance debt that qualifies as a qualified education loan, but does not include debt owed to a related person as defined by I.R.C. § 267(b) or I.R.C. § 707(b)(1) (I.R.C. § 221(e)(1)). However, refinancing a loan does not extend the 60-month period. The 60-month period is based on the original loan.
- 10. A revolving line of credit will qualify as an education loan only if the borrower agrees to use it only for qualified higher education expenses.

11. Qualified higher education expenses are the costs of attendance at an eligible educational institution, which is generally a post-secondary educational institution eligible to participate in the federal student loan program. An eligible educational institution also includes one conducting an internship or residency program leading to a degree or certificate awarded by an institution of higher education, a hospital, or a health care facility which offers postgraduate training (I.R.C. § 221(e)(2)).
12. Qualified higher education expenses include tuition, fees, room and board, and related expenses, but must be reduced by the amount excluded by reason of such expenses under the rules for employer-provided educational assistance benefits, income from U.S. Savings Bonds used to pay higher education expenses, distributions from an education IRA, and scholarships or fellowship grants (I.R.C. § 221(e)(2)).
13. No deduction is allowed under this section for any amount for which a deduction is allowable under any other provision of the Code (such as a home equity loan) (I.R.C. § 221(f)(1)).
14. In order to claim the student loan interest deduction, the taxpayer must complete the worksheet located in the tax form instructions and enter the allowable amount on Form 1040, line 24. The worksheet is located in the Form 1040 Booklet at page 28.
15. Changes Due to the Economic Growth and Tax Relief Reconciliation Act of 2001 (effective after 31 December 2001):
  - a. Increased phase-out ranges for eligibility for the student loan interest deduction:
    - (1) Single taxpayers - \$50,000 to \$65,000
    - (2) Married taxpayers filing joint returns \$100,000 to \$130,000
    - (3) These will be adjusted annually for inflation.

- b. Repeal of 60-month limit during which interest paid on qualified education loan is deductible.

B. Moving Expenses (Form 1040, line 26; Form 3903) (I.R.C. § 62(a)(15), 217(g)).

1. An employee or self-employed individual may deduct as an adjustment to income the expenses of moving himself and his family from one location to another if the move is related to starting work in a new location and the amount is reasonable. I.R.C. § 217.
2. The moving expense deduction is computed on Form 3903 and the amount allowed as a deduction is taken on Form 1040, line 26. Since this is an adjustment to income there is no need to itemize to take a moving expense deduction.
3. Generally, deductible moving expenses are limited to the cost of: (I.R.C. § 217(b))
  - a. Transportation of household goods and personal effects, and
    - (1) Items deductible include cost of packing, crating, cost of storing and insuring household good and personal effects within any period of 30 consecutive days after the day goods are moved from the former home and before they are delivered to the new home.
    - (2) Can deduct costs of connecting or disconnecting utilities required because of the move, shipping of car, and pet.
  - b. Travel (including lodging but not meals) to the new residence.

- (1) Can include lodging expenses in the area of the former residence within one day after the taxpayer could not live in the former home because of furniture being moved out of the home.
  - (2) Includes lodging expenses for the day arriving at new residence.
4. Where an automobile is used in making the move, a taxpayer may deduct either:
  - a. The actual out-of-pocket expenses incurred (gasoline and oil, but not repairs, depreciation, etc.) or
  - b. A standard mileage allowance of ten cents per mile in 1999.
5. Moving expenses do **not** include cost of meals and lodging for pre-move househunting trips; costs of meals and lodging (i.e., temporary living expenses); costs incident to sale (or lease) of old residence; costs incident to purchase (or lease) of new residence; car tags; and driver's license.
6. Generally, a taxpayer must meet a distance test, length of employment test, and a commencement of work test to be eligible to take the moving expense deduction. I.R.C. § 217(c), (d); Treas. Reg. § 1.217-2(a)(3), (d)(3).
7. Individuals that retire from an overseas job and return to the U.S. or a survivor (spouse or dependent) of any decedent who worked outside the U.S. at the time of death is also eligible to deduct moving expenses if, within six months of the decedent's death, the survivor move to the U.S. from a foreign residence that had been shared by the decedent. I.R.C. § 217(i).
8. Gross income does not include qualified moving expense reimbursements. These are amounts received from an employer as a payment for or reimbursement of expenses that would be deductible as a moving expense if directly paid or incurred by the employee. I.R.C. § 132(a)(6) and (g).

9. Any amount other than a qualified reimbursement received directly or indirectly by a taxpayer from the employer as a payment for or reimbursement of moving expenses must be included in the taxpayers gross income as compensation for services. I.R.C. § 82.
10. Employers are required to give employees a statement showing a detailed breakdown of reimbursements or payments of moving expenses. Treas. Reg. § 31.6051-1(e).
11. Foreign moves.
  - a. A moving expense deduction is permitted in connection with the commencement of work at a new principal place of work located outside the U.S. and its possessions.
  - b. The rules are similar to the general moving expense deductions rules, except that a deduction is also allowed for reasonable expenses of moving household goods and personal effects from storage, and of storing them for part or all of the time during which the new place of work abroad continues to be a taxpayer's principal place of work. I.R.C. § 217(h).
12. Moving Expenses of members of the Armed Forces (I.R.C. § 217(g)).
  - a. A move by an active duty member of the armed forces under a military order and incident to a change of station can qualify for deduction regardless of the distance moved or the length of time worked at the new station. I.R.C. § 217(g). Therefore, a service member that moves because of PCS does not have to meet the distance and time tests mentioned before.
  - b. A permanent change of station for purposes of this section includes:
    - (1) A move from a home to the first post of active duty,

- (2) A move from one permanent post of duty to another, and
  - (3) A move from the last post of duty to a home or to a nearer point in the U.S.. The move must occur within one year of ending of active duty or within the period allowed under the Joint Travel Regulations.
- c. If a service member deserts, is imprisoned, or dies, a PCS for the spouse or dependent includes a move to:
  - (1) The place of enlistment,
  - (2) The member's, spouse's, or dependent's home of record, or
  - (3) A nearer point in the U.S..
- d. Cash reimbursements or allowances are excludable from income to the extent of moving and storage expenses actually paid or incurred, as are all in-kind moving and storage services provided by the military. This exclusion applies to the spouse and dependents of a servicemember when they do not accompany the member and move to a location different from that to which the servicemember moves or different from that from which the servicemember moves.
- e. If total reimbursements or allowances received from the government because of the move are more than the actual moving expenses, the government should include the excess in wages on a Form W-2. This may be the case with some "Do it Yourself" moves or DITY moves. However, the excess portion of a dislocation allowance, a temporary lodging allowance, a temporary lodging expense, or a move-in housing allowance is not included in income.



- f. Where the military moves the servicemember and the member's family to or from separate locations and they incur unreimbursed expenses, their moves are treated as a single move to the member's new principal place of work (I.R.C. § 217(g)).
- g. No deduction is permitted for any moving or storage expense reimbursed by an allowance that is excluded from income (Treas. Reg. § 1.217-2(g)(6)).
- h. If a service members reimbursements or allowances are less than the actual moving expenses, the service member can deduct the expenses that exceed reimbursements and allowances (including dislocation, temporary lodging, temporary lodging expense, or move-in housing allowances that are excluded from gross income).
- i. If the above requirements are met by a service member, he/she can deduct reasonable unreimbursed expenses incurred for the following:
  - (1) Moving of household goods and personal effects, including expenses for hauling a trailer, packing, crating, in-transit storage, and insurance.
  - (2) Travel and lodging expenses from the old home to the new home, including automobile expenses and airfare.

C. Individual Retirement Arrangements (Traditional IRA). (Form 1040, Line 23)

- 1. Tax savings for a fully deductible \$2,000 IRA contribution by income tax bracket:

<u>Tax Savings</u>	<u>Tax Bracket</u>
\$300	15%
\$560	28%

2. Characteristics.
  - a. Simple procedure for establishing personal retirement program.
  - b. Full contributions currently deductible, except by "active participants" in retirement plans who have adjusted gross income in excess of specified levels.
  - c. Earnings on "traditional" IRAs are not subject to federal income tax until distributed, unless involved in "prohibited transaction," used as security for a loan, or the IRA receives unrelated business income. I.R.C. § 408(d)(1).
3. Contribution Deadline. Normally due date for the return (15 April without regard to extensions); however, the IRA need not actually be established until such due date in order to claim a contribution (I.R.C. §219(f)(3)).
  - a. Contribution may be deducted if it is mailed before the return due date, even if it is not received by the IRA custodian until after the due date.
  - b. Deduction may be claimed on return--even if contribution not yet made--so long as contribution actually occurs by due date.
  - c. The CZ/QHDA extension, provides service members with an additional period in which to contribute to an IRA for a preceding tax year.
    - (1) To qualify, the service member must make a contribution before the earlier of the end of the income tax return filing period established under the CZ/QHDA tax extensions or the date on which the federal income tax return actually is filed. I.R.C. § 7508.

- (2) For example, a contribution made on June 1, 2000 could be designated as a contribution for the 1999 tax year if it is made before the taxpayer's CZ/QHDA suspension period expires. The taxpayer would have to designate the contribution as a contribution for the 1999 tax year to claim it on his or her 1999 income tax return.
- (3) For information on CZ/QHDA and IRA contributions *see* I.R.S. Notice 91-17, 1991-23 I.R.B. 25; I.R.S. Notice 99-30, 1999-22 I.R.B. 1, Q & A #21; Major George Hancock, *Tax Note, IRA Contributions By Desert Storm Personnel*, ARMY LAW., Sep. 1991 at 35.

4. Taxpayer must have earned compensation.

- a. Includes wages, salaries, tips, bonuses, commissions, partnership, alimony, self-employment income, and other amounts for personal services. Only compensation includible in gross income is used. I.R.C. § 219(f).
- b. Does not include passive income such as profits from property, i.e., rental income, interest dividends, pensions, or annuities (including military retirement pay).
- c. Compensation also does not include foreign earned income excluded from gross income.

5. There are special rules for certain married individuals which allow a taxpayer with no earned compensation or amounts less than \$2,000 to participate in an IRA (I.R.C. § 219(c)). These special rules for spouses will be discussed in detail later in the outline.

6. Limits on IRA Contributions.

- a. The maximum annual deductible contribution is the lesser of \$2,000 per person or the total compensation included in gross income for the year. I.R.C. § 219(b)(1).

- (1) Limitations for Participants in Employer-Provided Retirement Plans.

- (a) The Tax Reform Act of 1986 established limits on the deductibility of contributions by taxpayers covered by an employer-provided retirement program.
- (b) One is considered covered by an employer-provided plan even though the plan has not vested.
- (c) Active duty service members are considered covered by an employer-provided retirement plan (I.R.C. § 219(g)(1); IRS Notice 87-16; Morales-Caban v. Commissioner, T.C. Memo 1993-466, 66 T.C.M. (CCH) 995 (1993) (active duty military covered by employer-provided plan).
- (d) Members of the reserve components who are not on active duty for over 90 days are not, by virtue of their reserve status, considered covered by an employer-provided plan. I.R.C. § 219(g)(6).

- (2) Taxpayers with an AGI less than the applicable amount are permitted a full deduction.

- b. Full deduction of \$2,000 allowed if taxpayer is not covered by employer-provided retirement plan and earns at least \$2,000.

c. IRA contributions may be limited if the taxpayer is covered by an employer-provided retirement plan (e.g., service members).

(1) Phaseout of deduction depends on income and filing status (I.R.C. § 219(g)(2)(A)).

(2) Taxpayers may make nondeductible contributions to the extent a deduction is disallowed. Must be reported to the IRS on Form 8606.

### CAN YOU TAKE AN IRA ADJUSTMENT?

If your 2000 Modified AGI* is:		If you are covered by a retirement plan at work & your filing status is:		
At Least	But Less Than	Single <u>or</u> Head of Household	Married filing Jointly <u>or</u> Qualifying Widow(er)	Married Filing Separately
\$0	10,000	Full deduction	Full deduction	Partial deduction
10,000	33,000	Full deduction	Full deduction	No deduction
33,000	43,000	Partial deduction	Full deduction	No deduction
43,000	53,000	No deduction	Full deduction	No deduction
53,000	63,000	No deduction	Partial deduction	No deduction
63,000 or over		No deduction	No deduction	No deduction

d. Deduction phaseout. The deduction is reduced or eliminated entirely depending on the taxpayer's filing status and income.

\* Modified AGI (adjusted gross income) is: (1) for Form 1040A--the amount on line 14 increased by any excluded series EE bond interest shown on Form 8815, EXCLUSION OF INTEREST FROM SERIES EE U.S. SAVINGS BONDS ISSUED AFTER 1989, or (2) for Form 1040--the amount on line 33, figured without taking into account any IRA deduction or any foreign earned income exclusion and foreign housing exclusion (deduction), or any series EE bond interest exclusion from Form 8815.

7. Special rules for married taxpayers.
- a. There are special rules for certain married individuals which allow a taxpayer with no earned compensation or amounts less than \$2,000 to participate in an IRA (I.R.C. § 219(c)). This section is not specifically for nonworking spouses.
- (1) An individual who files a joint return and has less taxable compensation than his spouse may contribute to a spousal IRA and deduct the lessor of \$2,000, or the sum of that individual's includible compensation for that tax year, plus the includible compensation of the individual's spouse reduced by the spouse's allowable IRA deduction and Roth IRA contribution for that tax year. I.R.C. § 219(c), (f).
  - (2) The practical application of this provision permits IRA contributions (and perhaps a deduction) of up to \$2,000 for each spouse (including a spouse with no compensation or less than \$2,000 of compensation for the year) if their combined compensation income for the year equals or exceeds the contributed amount.
  - (3) Total contributions to both are limited to \$4000. The maximum contribution to either spouse's IRA is limited to \$2,000.
  - (4) Service members who serve an entire calendar year in a CZ/QHDA may have no taxable compensation or very little taxable compensation and may be unable to make an IRA contribution.
  - (5) A married service member filing a joint tax return whose service in a CZ/QHDA results in less than \$2,000 of taxable income, but whose spouse is working and earns taxable compensation can make contributions to his or her IRA up to the dollar limitation based upon the couples Adjusted Gross Income (AGI) (I.R.C. § 219(c)).

(6) Because of recent changes to the tax laws relating to spousal IRAs, it appears that the compensation limitation will only come into play for service members in the CZ/QHDA if the combined includible compensation of a husband and wife for the tax year is less than the sum of their dollar limitations. The service member in the CZ/QHDA who has less than \$2,000 taxable compensation for the calendar year can aggregate his/her compensation with his/her spouse's compensation in order to contribute (and possibly take a deduction) (I.R.C. § 219(c)).

b. The applicable dollar limit is higher than the usual limit for an individual who is not an active participant in an employer plan during any part of the year, but whose spouse is an active plan participant. I.R.C. § 219(g)(7). For these individuals, the IRA deduction phase-out begins at \$150,000 AGI and it is eliminated at \$160,000 AGI or more.

8. **New Law.** The 2001 Act substitutes “the deductible amount” for the specific reference to \$2,000 as the maximum annual dollar contribution limit (Code Sec. 219(b)(1)(A) as amended by 2001 Act §601(a)(1)) and provides that the deductible amount will be determined under the following table:

<b>For taxable years beginning in:</b>	<b>The deductible amount is:</b>
2002 through 2004	\$3,000
2005 through 2007	\$4,000
2008 and thereafter	\$5,000

## **X. STANDARD DEDUCTION. (I.R.C. § 63(C)).**

2001 Amounts.

<u>Filing Status</u>	<u>2001 Standard Deduction Amount</u>
Single	4,550
Married filing jointly/qualifying widow(er)	7,600
Head of household	6,650
Married filing separately	3,800

## **XI. ITEMIZED DEDUCTIONS.**

- A. Taxpayer's Choice. If itemized deductions are less than the standard deduction, taxpayer should take the standard deduction. A taxpayer may change his mind even after filing the Form 1040 return by filing an amended return on Form 1040X.
  - 1. Deductions must be authorized; i.e., the taxpayer must have some authority to justify any deduction (I.R.C. § 63(a)).
  - 2. The authority must be in the I.R.C., regulations, case law, or Revenue Rulings.
- B. Medical and Dental Expenses. Deductible only to the extent they exceed 7.5% of AGI (I.R.C. § 213(a)).
- C. Taxes. (I.R.C. §164; Schedule A, lines 5-9).
- D. Interest Expense. (I.R.C. §163(h); Schedule A, lines 10-14).
- E. Charitable Contributions. (I.R.C. §170(a); Schedule A, lines 15-18).
- F. Job Expenses and Most Other Miscellaneous Deductions. (I.R.C. § 67(a); Schedule A, lines 20-26).



1. General. The following items can be deducted only to the extent they exceed 2% of the taxpayer's AGI:
  - a. Professional society dues.
  - b. Employment related educational expenses.
  - c. Expenses of looking for a new job.
  - d. Professional books, magazines and journals.
  - e. Work clothes and uniforms.
  - f. Certain unreimbursed employee business expenses.
  - g. Safe deposit box rental.
  - h. Tax counsel and assistance.
  - i. Cost of work-related small tools and supplies.
2. Employee Business Expenses.
  - a. Employee business expenses in general and travel away from home, local transportation, entertainment and educational expenses, in particular, perhaps cause more controversy than any other item on a military member's return. The controversy usually revolves around (i) whether a particular item is deductible, (ii) the amount of deduction available, or (iii) proof of the deduction.
  - b. Under I.R.C. § 62, only expenses paid or incurred by the taxpayer in connection with the performance by him of services as an employee, under a reimbursement or other expense arrangement with his employer, are deductible in computing adjusted gross income.

- c. Expenses which do not qualify for deduction under I.R.C. § 62 may still be deductible under I.R.C. §§ 162 or 212 if the taxpayer itemizes deductions.
  - (1) I.R.C. § 67 makes these expenses miscellaneous itemized deductions that are subject to the 2% floor.
  - (2) Effective December 31, 1993, deductible meal and "entertainment" expenses must be reduced by fifty percent (50%) (I.R.C. §274 (n)(1)).

3. Reimbursed Expenses.

- a. General Rule. An employee who adequately accounts to his employer is not required to report the reimbursement on his tax return if the advances or reimbursements equal the expenditures. Also, he need not report the advance or reimbursement as income, if he does not report the expense. No Form 2106 need be filed (Reg. § 1.162-17(b)(1)).
- b. Where the reimbursements are in excess of the expenses, the excess constitutes income and must be reported as such. Form 2106 need not be filed; however, the income must be reported on Form 1040, 1040A or 1040EZ (Treas. Reg. § 1.162-17(b)(2)).
- c. Where the expenses are in excess of the reimbursement, they may constitute a deduction. Form 2106 and Schedule A, Form 1040 must be filed to properly claim the deduction. However, if the excess employee business expenses do not exceed two percent of adjusted gross income, they are not deductible and Form 2106 need not be filed (Treas. Reg. § 1.162-17(B)(3)).
- d. Per diem received by service members constitutes a tax-free allowance excludable from income. I.R.C. § 134, Letter from Assistant Secretary of Treasury to Undersecretary of Defense (Personnel and Readiness), dated 20 November 1996. However, see reimbursements above.

4. Substantiation. The employee must keep accurate records or sufficient evidence corroborating statements as to (1) amount, (2) time and place, (3) business purpose, and (4) business relationship of any entertained person. A detailed record must be kept, such as a diary, account book, or other statement of expense. The taxpayer must have documentary evidence for any lodging expense while traveling away from home and for any other expense of \$75.00 or more (Treas. Reg. § 1.274-5T(c)(2)(iii) (\$25.00 for expenditures before October 1, 1995 (Treas. Reg. § 1.274-5) Automobile use should be documented by recording the beginning and ending mileage readings.

5. Threshold Requirement - must be "***Business Expense***."
- a. To be deductible, the expense must be an ordinary and necessary cost which bears a sufficient relationship to the taxpayer's business or income-producing activity and be reasonable in amount (I.R.C. §§ 162(a)(2), 212).
  - b. If the expenditure is incurred primarily for personal purposes and bears little or no relationship to the taxpayer's business, it is not a deductible expense (I.R.C. § 262).
  - c. The expenses must also be "ordinary and necessary."
    - (1) "Ordinary" means common and accepted in the business.
    - (2) "Necessary" means helpful or appropriate; it does not mean absolutely indispensable.
    - (3) The expenses must also be "reasonable" in amount; i.e., not lavish or extravagant.
    - (4) Expenses related to tax-exempt income are not deductible.

- d. The following are **not** ordinary business expenses and are **not deductible**:
- (1) Dues paid by service-members to an officers' or a noncommissioned officers' club. Rev. Rul. 55-250, 1955-1 C.B. 270.
  - (2) Uniforms for "special occasions" (like dress blues), absent a showing that military regulation prohibit wearing the uniform while off-duty. Hatch v. Commissioner, 35 T.C.M. (CCH) 1737 (1976); Commissioner v. Motch, 180 F.2d 859 (6<sup>th</sup> Cir. 1950; Priv. Ltr. Rul. 81-20-036 (Feb. 18, 1981). Priv. Ltr. Rul. 80-34-132 (May 30, 1980);
  - (3) Servicemember required to have hair cut every two weeks. Drake v. Commissioner, 52 T.C. 842 (1969).
  - (4) Expenses incurred by a Marine Corps artillery officer for a law school education, bar review course, and bar examination in order to qualify as a legal officer are not deductible as "educational expenses." Rev. Rul. 72-450, 1972-2 C.B. 89.
  - (5) Out of pocket expenses for law books and other incidental expenses paid by Air Force FLEP student are nondeductible personal expenses under I.R.C. § 262. Priv. Ltr. Rul. 80-43-128 (Aug. 1, 1980).
  - (6) Stationery and callings cards. The servicemember failed to establish that the origin and character of these expenditures have a direct relationship to the servicemembers business. Fogg v. Commissioner, 89 T.C. 310 (1987).

- e. The following have been considered ordinary and necessary expenses in carrying on a trade or business (deductible).
- (1) A Navy Captain whose assignments involve primarily command and administration of personnel may deduct educational expenses incurred in obtaining a master of arts degree in personnel administration. Rev. Rul. 69-199, 1969-1 C.B. 51.
  - (2) Officer assigned several positions relating to national security matters. Educational program (degree of M.A. in International Securities Studies) expenses are deductible. Priv. Ltr. Rul. 88-13-049 (Jan. 4, 1988).
  - (3) Entertainment of employees incurred by an employer (commander, section chief, OIC) are deductible provided the entertainment is not lavish or extravagant. Examples would be buying subordinates a meal during duty hours when business is being discussed. I.R.C. § 162.
  - (4) Leaders who provide social gatherings for all or selected organizational members and their families should be entitled to deduct those reasonable costs associated with the function as a business entertainment expense. I.R.C. § 274(e); Treas. Reg. § 1.274-2(f). However, a taxpayer is not allowed to deduct the expense of a party merely because he or she invited a few employees. These gatherings must pass the “directly related” to or “associated with” business test.
  - (5) Entertainment expenses incurred by a servicemember in connection with a change-of-command ceremony were deductible. *Fogg v. Commissioner*, 89 T.C. 310 (1987).

- (6) Contribution to Unit Fund. A contribution to the “Squadron Fund,” a fund maintained within a military unit by donations from the unit officers, that is used to purchase mementos, such as unit emblems, for departing personnel, to pay for flowers for personnel in hospital, etc., was held deductible. Note that this servicemember was expected to make a contribution as an officer/commander, and if he refused to contribute to the fund, his career might have been jeopardized. The servicemember did not receive any personal or substantial benefit from the fund. *Fogg v. Commissioner*, 89 T.C. 310 (1987).
- (7) Military fatigue uniforms (BDU’s). *Fogg v. Commissioner*, 89 T.C. 310 (1987).
  - (a) The amounts expended by servicemembers on active duty for the purchase and maintenance of BDU’s, where local regulations prohibit their off-duty wear, are, to the extent the expenses exceed allowances received, are deductible for income tax purposes as ordinary and necessary business expenses. Rev. Rul. 67-115, 1967-1 C.B. 30.
  - (b) Cleaning of BDU’s are deductible if meets the above test. *Drake v. Commissioner*, 52 T.C. 842 (1969);

6. "Travel" Expenses.

- a. General Rule and Includible Expenses. To be deductible, "travel" expenses must be ordinary and necessary and incurred in connection with the performance of duty (usually TDY) while away from home overnight (or for substantially longer than normal duty hours and, during the time away from home, the taxpayer needs to get rest or sleep in order to perform duties).
- b. Meals and Lodging. Deductible only if the travel is long enough to require sleep or rest. If the taxpayer returns home each evening, he may not deduct those expenses (Treas. Reg. § 1.162-1(g)).
- c. Rules Applicable to Military Members. "Travel" expenses incurred by military personnel while on travel status on temporary assignments away from their permanent stations are deductible business expenses under I.R.C. § 162(a)(2).
  - (1) The deduction need not be offset by the basic subsistence and quarters allowance (which is non-taxable under Treas. Reg. § 1.61-2(b)), unless the member is a reservist performing temporary active duty. Rev. Rul. 55-572, 1955-2 C.B. 45.
  - (2) Expenses incurred in connection with a change of permanent duty station do not qualify as "travel" expenses, but may be deductible as a moving expense. Rev. Rul. 76-2, 1976-1 C.B. 82.
  - (3) A military member's "tax home" is his duty station, not where his family lives, even if the family could not go with him. Rev. Ruls. 55-571, 1955-2 C.B. 44. and 67-438, 1967-2 C.B. 82.



- (4) A member of the military services is "not away from home" while at his permanent duty station and may not deduct traveling expenses, including meals and lodging, incurred at such location. This is so even though it is not feasible or even permissible for his family to join him. CIR v. H.A. Stidger, 386 U.S. 287 (1967).
- (5) Members of the U.S. armed forces on permanent duty assignments at official stations overseas are not traveling "away from home" and may not deduct their expenses for meals and lodgings at such locations, even though they are required to maintain homes in the U.S. for their families who are not allowed to accompany them. Rev. Rul. 55-571, 1955-2 C.B. 44.
- (6) A naval officer on permanent duty aboard ship has a tax home aboard the ship. The IRS has stated it will apply this rule to crewmen of nuclear submarines who serve six months of the year aboard the vessel and the other six months ashore. Rev. Rul. 67-438, 1967-2 C.B. 82.
- (7) An Army officer could not deduct the cost of his meals in an officers' mess, a voluntary organization to which he belonged, or the expense of a "striker fee" (janitor service for his living quarters), inasmuch as he was not "away from home". His place of business was his army post. Bercaw v. CIR, 165 F.2d 521 (4th Cir. 1948).
- (8) A ready reservist on temporary active duty, who has a place of business or employment which he retained and to which he will return after his period of service, is in travel status and may deduct his meals and lodging at his official military post of duty to the extent such expenses exceed any nontaxable basic subsistence allowances received for those expenses. The deduction does not include expenses for family members. Rev. Rul. 63-64, 1963-1 C.B. 30.

- (9) A serviceman's expenses in visiting home and in returning home after his discharge, including the cost of moving his family, are nondeductible personal expenses. Frederick Tilney, Jr., 12 T.C.M. (CCH) 92, 1953.

7. Entertainment Expenses.

- a. Requirements for Deductibility. In order to be deductible, entertainment expenses generally must meet the following requirements:

- (1) All "ordinary and necessary" expenses paid or incurred in carrying on a trade or business are deductible. A military officer is engaged in a trade or business. *Carlisle v. Commissioner*, 37 T.C. 424, 429 (1961); *Lindsay C. Howard*, 16 T.C. 157, 161 (1951), *aff'd* 202 F.2d 28 (9th Cir. 1953).

- (i) Ordinary means common and accepted in the field of business. Necessary means helpful and appropriate for the business.

- (2) Effective for expenses paid after 1993, only 50% of otherwise deductible entertainment expenses qualify for deduction (I.R.C. § 274).

- b. Application to the Military. Section 162(a) allows deductions for current business expenses while section 262 disallows deductions for "personal, living, or family expenses." The proper test to be applied in resolving the tension between section 162 and section 262 is "whether the expense was 'business' or 'personal.'" *Fogg v. Commissioner*, 89 T.C. 310, 316 (1987).
- (1) The Personal Money Allowance received by Lieutenant Generals and Generals is gross income. However, Congress provided the allowance in recognition of the additional expenses peculiar to the military ranks or positions in question. *See* H.R. Rep. No. 640, 80th Cong., 1st Sess. 12 (1974). To the extent that the officer expends these funds for their intended purpose of defraying certain costs incurred in connection with their official duties, the expenses should be deductible as ordinary and necessary business expenses. Rev. Rul. 77-350, 1977-2 C.B. 21.
- (2) Other officers must establish that "the origin and character of the events or circumstances that give rise to the expenditures in question are directly related to petitioner's trade or business of being a military officer." *Fogg v. Commissioner*, 89 T.C. 310, 317 (1987).

- (3) In *Fogg*, a Marine LTC deducted the costs associated with a change in command ceremony reception and the cost of contributions to a squadron unit fund. LTC Fogg introduced evidence that showed all commanders were required to engage in "official entertaining," including change in command ceremonies and that his career might have been jeopardized if he failed to contribute to the squadron fund. The Tax Court found that the reception was required by LTC Fogg's employer (even though he was not under a direct order to do so) and that they directly flowed from a business ceremony. The Court drew an analogy between the officer and a "hard-headed businessman" and determined that the businessman would have incurred the expenses. Because LTC Fogg convinced the Court that he was expected to contribute to the squadron fund or his career would be jeopardized, the Court ruled that the expenses were deductible being appropriate, helpful, and necessary for his career.
- (4) In *Pollock v. Commissioner*, 10 B.T.A. 1297 (1928), which is relied on in *Fogg*, the petitioner, a naval officer, was appointed as Governor of American Samoa. In connection with his duties, the petitioner was required to extend courtesies to representatives of other countries; amounts for which the petitioner was not reimbursed. Refraining from making the expenditures, however, would not have been consistent with the petitioner's duties. The court opined that the continuance of the petitioner's naval standing, from which his income was derived, would have been seriously jeopardized had he failed to make the expenditures; therefore, the amounts paid out of his personal funds were deductible as ordinary and necessary expenses. Thus, while the officer in *Pollock* may not have been under a direct order, the Court recognized that one need not be threatened with a court martial in order for an expenditure of a military officer to be considered "necessary."

- (5) *Carlisle v. Commissioner*, 37 T.C. 424 (1961) held that expenses incurred in securing a medical discharge were not deductible because they were not ordinary and necessary to the business of being an Army officer. The Court had "difficulty in understanding how expenses incurred to expedite a discharge from the Army are ordinary and necessary in carrying on that business. Such expenses appear neither ordinary nor necessary to such a business under even the most broad reading of the statute." Similarly, it is unlikely that expenses incurred in connection with a retirement ceremony would be deductible.

8. Professional Persons' Special Expenses.

a. General Rule.

- (1) Professional persons who are also employees (e.g., attorneys, physicians, teachers) can deduct as an itemized deduction on Schedule A the cost of supplies used in the practice of their profession, dues paid to professional associations, subscriptions to professional journals and the cost of professional books with a short useful life.
- (2) The case law has allowed the deduction of the cost of a briefcase by a salesman; this rule should also apply to attorneys, teachers and other professionals for whom a briefcase is a necessary part of their professional duties.

b. Attorneys.

- (1) Special expenses of attorneys which have been held to be deductible include bar association dues, cost of home telephone used for business and depreciation of tape recorder used for business only.

- (2) Fees paid to take bar examinations and for admission to practice before federal court and travel expenses to obtain license to practice before Supreme Court have been held to be capital expenses amortizable over the taxpayer's life expectancy.

## **XII. TAX CREDITS**

### **A. Types of credits.**

1. A credit is a dollar-for-dollar reduction of the taxpayer's tax liability.
2. A ***refundable credit*** can be greater than the tax owed. Taxpayers not only can have their tax reduced to zero, but they can also receive a refund of the excess credit.
3. A ***nonrefundable credit*** can also be greater than the tax, but the nonrefundable credit can only reduce tax liabilities to zero. Taxpayers do not receive a refund for any excess nonrefundable credit.

### **B. Child tax credit. (Form 1040, line 43 & 60; child tax credit worksheet in form 1040 instructions (page 33-34); form 8812)**

1. A credit of \$400 was allowed for 1998 and \$500 for years after 1998 for each qualifying child. A taxpayer may be entitled to a child tax credit for each qualifying child for whom the taxpayer claims an exemption. This is a ***nonrefundable credit***. I.R.C. § 24.

2. **New Law.** The 2001 Act increases the child tax credit to \$1,000, with the increase phased-in over ten years, starting with tax years beginning in 2001. ([Com Rept. see ¶5005](#)) For tax years beginning after 2000 (2001 Act §201(e)(1)) , the credit will be allowed in an amount equal to the “per child amount” for the applicable tax year. ([Code Sec. 24\(a\)\(1\) as amended by 2001 Act §201\(a\)](#)) The table below shows the per child amount for the years of the phase-in and afterwards.

Any tax year beginning in:	The per child amount is:
2001	\$600
2002	600
2003	600
2004	600
2005	700
2006	700
2007	700
2008	700
2009	800
2010	1,000

3. A qualifying child is one who meets the following criteria.
- a. The child must not have reached the age of 17 by the end of the tax year for which the credit is sought.
  - b. A citizen or resident of the United States.
  - c. The child must be the taxpayer’s child (or descendant thereof), stepchild, or foster child of the taxpayer.
  - d. The taxpayer must be *allowed* the personal exemption deduction with respect to such child.
    - (1) The parent that is "allowed a deduction" with respect to such child will be entitled to the credit. Must be allowed to claim a dependency exemption for a child in order to take child tax credit (I.R.C. § 24(c)(1)(A)).

(2) IRS interpretation: In order to claim the child tax credit, the parent must claim the child as a dependency exemption. The parent claiming the child tax credit must list the child as a dependency exemption on the tax form and include the qualifying child's name and social security number. If the custodial parent waives the dependency exemption, the noncustodial parent gets both the exemption and the child tax credit.

e. The credit will be phased out by \$50 for each \$1,000 that the taxpayer's modified adjusted gross income exceeds \$110,000 in the case of a joint return, \$75,000 in the case of an individual who is not married, and \$55,000 in the case of a married individual filing a separate return.

4. Additional Child Tax Credit. I.R.C. § 32(n). Form 8812.

a. For taxpayers with three or more children, a portion of the credit may be refundable under a special formula. This is actually a supplemental child credit under the earned income credit (I.R.C. § 32). It does not affect the total tax credits allowed to the taxpayer. This is a ***refundable credit***.

b. After all the other credits are applied according to the stacking rules to reduce the taxpayer's tax liability for the year, then the refundable credits are applied. The refundable credits first reduce the taxpayer's tax liability for the year, and any remaining credit in excess of the tax liability for the year is payable to the taxpayer.

c. The amount of the additional child tax credit is equal to the lesser of the child tax credit that would be allowed if computed without regard to the refundable additional credit and the tax liability limitation (I.R.C. § 26(a)), or the amount that the total nonrefundable personal credits (including the child credit but without regard to the refundable additional credit) would increase if the tax liability limitation were increased by the excess of the taxpayer's social security taxes for the tax year, or the earned income credit determined without regard to the additional child tax credit for the tax year.



- d. **New Law.** The 2001 Act makes the child tax credit refundable for all taxpayers with qualifying children, regardless of the number of children, to the extent of 10% of the taxpayers earned income in excess of \$10,000 (15% for tax years after 2004). Thus, in 2001, families with earned income of \$14,000 and more than one child will get a refundable credit of \$400. The 2001 Act also allows families with three or more children to use the method of computing their refundable child credit that applied under that pre-2001 Act law or the method made available by the 2001 Act to all taxpayers with qualifying children.

C. Educational Credits. (Form 1040, line 44; form 8863).

- 1. Hope Scholarship Credit. I.R.C. § 25A.
  - a. A taxpayer is allowed a tax credit for money spent on qualified tuition and related expenses during the first two years of a student's post-secondary school education (*a per student credit*). I.R.C. § 25A(b)(2)
  - b. The student must carry at least half of the normal full-time workload for the course of study the student is pursuing. I.R.C. § 25A(b)(3)(B).
  - c. The credit can be as much as \$1,500 and consists of 100% of the first \$1,000 spent on tuition and related expenses and 50% of the next \$1,000 so spent.

2. Lifetime Learning Credit. I.R.C. § 25A.
  - a. The Lifetime Learning Credit, which applies to expenses paid after June 30, 1998, is available for any level of higher education (both credit and noncredit courses). The Lifetime Learning Credit differs from the Hope credit in that it covers a broader period and range of educational courses. Whereas the Hope credit applies only to the first two years of post secondary education, the Lifetime Learning Credit applies to expenses for undergraduate, graduate, and continuing education courses. Expenses for courses of instruction at an eligible institution *to acquire or improve job skills* that would not qualify for the Hope credit qualify for the Lifetime Learning Credit. I.R.C. § 25A(c)(2)(B)
  - b. A credit is allowed for 20% of first \$5,000 (= \$1,000) of qualified tuition paid by the taxpayer (Will increase to 20% of \$10,000 in 2003). Thus, the maximum credit allowed will be \$2,000 in 2003 (*a per taxpayer credit*).
  - c. A person who is eligible for the Hope Scholarship is not entitled to the Lifetime Learning Credit.
3. Qualified tuition and related expenses consist of tuition and mandatory fees paid by the taxpayer on behalf of himself, his spouse, or any dependent of the taxpayer for which the taxpayer is allowed the dependency exemption.
  - a. Qualified tuition and related expenses mean tuition and fees required for the enrollment or attendance at a post-secondary educational institution eligible to participate in the federal student loan program. They do not include the costs of books, room and board, transportation, etc. Expenses for courses involving sports, games, or hobbies do not qualify unless they are part of the student's degree program. Nonacademic fees, such as student activity fees, athletic fees, insurance expenses, do not qualify. I.R.C. § 25A(f).

- b. The taxpayer should be careful to reduce qualified tuition and related expenses by scholarships, Pell grants, employer-provided educational assistance, and other tax-free payments. However, qualified amounts do not have to be reduced by amounts paid by gift, bequest, devise, or inheritance. I.R.C. § 25A(g)(2). In addition, no credit is allowed for any expense for which an income tax deduction is allowed. I.R.C. § 25A(g)(5).
- 4. The Hope Scholarship and Lifetime Learning Credits are phased out for taxpayers with modified adjusted gross income from \$80,000 to \$100,000 in the case of a joint return and from \$40,000 to \$50,000 in all other cases.
- 5. For each eligible student, a taxpayer may claim only one of the education credits in a single tax year. I.R.C. § 25A(c)(2).
  - a. Must be allowed to claim a dependency exemption for a child in order to take the Hope or Lifetime Learning Scholarship credits (I.R.C. § 25A(f)(1)(A)(iii)).
  - b. An eligible student is a person that can be claimed as a dependency exemption. It generally includes unmarried children under age 19 or who is a full-time student under 24 if the taxpayer supplies more than half the child's support for the tax year. If a dependency exemption for an individual is allowed to another taxpayer, the dependent cannot claim the credit, and qualified tuition and expenses paid by the dependent during the tax year will be treated as paid by the taxpayer who is allowed the dependency exemption. I.R.C. § 25A(g)(3).
- 6. Taxpayers who are married (within the meaning of § 7703) are not entitled to either credit unless they file a joint return. Married taxpayers incurring qualified expenses must file a joint income tax return in order to claim the educational tax credits. No credit under I.R.C. § 25A is allowed for married taxpayers filing separate returns. In order to claim the credit, the taxpayer must include the student's name and social security number on his or her return.

7. If a student receives a tax free distribution from an education Individual Retirement Account (IRA) in a particular tax year, none of that student's expenses can be used as the basis of a higher education tax credit for that year. I.R.C. § 530(d).
8. These are nonrefundable credits.

D. Earned Income Credit. (Form 1040, line 59; Schedule EIC, EIC Worksheet)

1. General.
  - a. The Earned Income Credit (EIC) is a ***refundable tax credit***. Eligible taxpayers can receive a refund for this credit even if they owe no tax and had no income tax withheld. I.R.C. § 32.
  - b. EIC provides tax relief to low-income workers, including certain workers with no children.
  - c. Cannot claim the EIC if the taxpayer claims the foreign earned income exclusion. I.R.C. § 32(c)(1)(D).
2. Eligible taxpayers that can claim EIC:
  - a. Married taxpayers who are entitled to a dependency exemption for their child, grandchild, eligible foster child or stepchild.
    - (1) Married taxpayers generally must file married filing jointly.
    - (2) Certain married taxpayers who live apart from a spouse need not file a joint return to claim the credit.

- b. A custodial parent, even if that parent agrees to allow the noncustodial parent to claim the child as a dependency exemption.
  - c. Surviving Spouses.
  - d. Heads of households who maintain a home for a child, adopted child, stepchild, eligible foster child or descendent of a child. (A married child must qualify as a "dependent" for whom the taxpayer is entitled to a dependency exemption.).
  - e. An individual who does not have a qualifying child may be eligible for the credit if the principal place of residence of the individual is in the U.S. for more than one-half of the tax year, the individual (or the spouse of the individual) is at least age 25 and under age 65 before the close of the tax year, and the individual is not claimed as a dependent by another.
3. Qualifying Tests.
- a. Taxpayer with qualifying child(ren) must:
    - (1) Have earned income of under \$27,413 if one qualifying child (\$31,152 if two or more qualifying children);
    - (2) Have a qualifying child who lived with the taxpayer in the taxpayer's main home in the U.S. (or overseas if taxpayer is a member of the armed forces stationed overseas) for more than 6 months of the year;
    - (3) File a joint return if married; and
    - (4) Complete and attach Schedule EIC to the tax return.
  - b. Taxpayer without qualifying child(ren) must:

- (1) Have earned income and AGI under \$10,380;
- (2) Have main home in U.S. for more than 6 months of the year or be a member of the armed forces stationed overseas;
- (3) Be at least 25, but under 65 (If filing jointly, either spouse must satisfy age component of test.);
- (4) File a joint return if married; and
- (5) Not be a dependent or qualifying child of another taxpayer.

4. Definitions.

- a. Earned Income. Includes both taxable and nontaxable earned income.
  - (1) Wages, salaries, tips, and other employee compensation.

- (2) Military taxpayers must include:
  - (a) Wages, salaries, tips,
  - (b) Housing and subsistence allowances and in-kind equivalents received by service members,
    - (i) Include the Basic Allowance for Housing (BAH) and the Basic Allowance for Subsistence (BAS) received by service members and the value of meals and lodging furnished in kind to military personnel residing on military bases. *Neff v. U.S.*, Fed. Cl., No. 97-750 T, 5/25/99. A copy can also be found at <http://www.ogc.gov/fedcl/opinions/99opin/98-750T.html>.
    - (ii) To calculate the value of meals and lodging furnished in kind, the taxpayer may assume the value is equal to the combined BAH and BAS that the service member would have received had he/she been entitled to the allowance.
  - (c) Combat zone excluded pay.
  - (d) Earned income that is not taxable, such as combat pay, BAH, BAS, and certain in-kind equivalents, is reported on Form W-2, Box 13, Code Q.
- b. Earned income does not include interest, dividends, social security payments, pensions or annuities, Veteran's benefits, and variable housing allowances.

- c. Qualifying child. Taxpayer's son, daughter, adopted child, grandchild, stepchild, or foster child who at the end of the year was under 19 (or under 24 and a full-time student), or any age if permanently and totally disabled. I.R.C. § 32(c)(3).
  - d. Household requirement. The qualifying child must have lived in the taxpayer's main home for more than 6 months of the year. (Foster child must have lived there for all of the year.)
    - (1) Qualifying child must have lived with taxpayer in same main home for more than one-half the year.
      - (a) Taxpayer may still satisfy this requirement if away from home on a temporary absence due to special circumstance.
      - (b) Temporary absence examples:
        - (i) illness,
        - (ii) attending school,
        - (iii) business,
        - (iv) military service.
5. If a taxpayer is receiving EIC because of a qualifying child, the child must reside in the same principal place of abode as the taxpayer for more than one-half of the taxable year. The principal place of abode must be located in the United States. For purposes of determining whether a qualifying child meets the residence test, the principal place of abode shall be treated as in the United States for any period during which a member of the Armed Forces is stationed outside the United States while serving on active duty.



6. No credit is allowed for 10 years after a year in which the EIC was claimed fraudulently (two years for erroneously claimed credit due to reckless or intentional disregard of the rules). If the EIC is denied under deficiency procedures, no credit is allowed for any later tax year unless the taxpayer provides information the IRS requires demonstrating eligibility. I.R.C. § 32(k).

### **XIII. TAX REFUNDS**

#### **A. Refund Offset:**

1. If a taxpayer owes a past-due federal tax, state tax, child support, spousal support, or certain Federal nontax debts, such as student loans, all or part of an overpayment (refund) may be used to pay the past-due amount.
  - a. Priorities for Offset.
    - (1) First, by amount of any past-due support assigned to a State;
    - (2) Second, by the amount of any past-due, legally enforceable debt owed to a Federal agency;
    - (3) Third, by the amount of any qualifying past-due support not assigned to a State; and
    - (4) Fourth, by the amount of any past-due legally enforceable State income tax obligation.

b. States can seek an offset for federal income tax refunds payable after December 31, 1999. I.R.C. § 6402(e)(2). As extended to state income tax debts, the program allows the state taxing authorities to ask the federal government to offset a taxpayer's federal income tax refund against the taxpayer's state income tax liabilities. Thus, the federal government acts as a collection arm for the states. 31 C.F.R. Part 285; 64 F.R. 71228 (December 20, 1999).

(1) The state first must show that it has made reasonable efforts to collect the tax.

(a) The term "State" means not only the States of the United States, but includes the District of Columbia, American Samoa, Guam, the U.S. Virgin Islands, Commonwealth of the Northern Mariana Islands, and the Commonwealth of Puerto Rico.

(b) "State income tax" includes all taxes determined under state law to be State income tax, and includes any local income tax that is administered by the chief tax administering agency of the State.

(2) Second, the state must notify the taxpayer of its intent to offset the taxpayer's federal refund claim and give the taxpayer 60 days to demonstrate that the state tax levy is not past due or not unenforceable.

- (3) States are required to certify compliance with pre-offset procedures and imposed by State law or procedures.
  - (a) The certification and pre-offset procedures include a requirement that States provide debtors with notice that they intend to collect the debt by referral to the Treasury for tax refund offset;
  - (b) That States afford debtors the opportunity to present evidence that all or part of the debt is not due; and
  - (c) That States establish procedures for reviewing evidence presented by debtors.
- (4) For refunds payable after December 31, 1999, the IRS will only be able to apply a refund for a tax year to offset state tax obligations if the address shown on the Federal return for the year of the overpayment is within the state seeking the offset.
  - (a) If the taxpayer moves to a different state, he is effectively exempt from application of a refund for a year after the move to a state tax obligations owed to the state from which he has moved.
  - (b) The address shown on the return is controlling for this purpose. Thus, literally read, even if a taxpayer actually continues to reside within the state seeking the offset, if he files the return showing an address outside that state IRS cannot apply the refund offset.

(5) The reduction of a taxpayer's refund for past due state tax is not subject to review by any court of the U.S. or by the Secretary of the Treasury, Financial Management Service, or the I.R.S. in an administrative proceeding. I.R.C. § 6402(f).

2. A taxpayer subject to offset will receive a notice from the Treasury Department's Financial Management Service showing the amount of the offset and the agency receiving it.

#### XIV. **CONCLUSION.**

## APPENDIX A

### MILITARY PAYROLL TERMS - - TAX STATUS

<b><u>Status</u></b>	<b><u>Pay Term</u></b>	<b><u>Definition</u></b>
I	Accrued leave pay	Lump sum for unused accrued leave when term of service expires.
I	Aviation Career Proficiency Pay	Incentive pay for Aviation Officers.
X	Basic Allowance for Housing (BAH)	Paid to members of the Armed Forces for housing.
X	Basic Allowance for Subsistence (BAS)	Paid for subsistence including rations furnished in-kind to enlisted members.
I	Basic Pay	Pay for active duty, training duty, drills, back pay, and attendance at designated service school.
X	Combat Exclusion (pay excludable up to max. enlisted pay per month for commissioned officers)	Pay received under Executive Order placing the Armed Forces in a combat area.
I	Continuation pay	Paid to certain personnel who extend their active duty period.
X	Cost of Living	Pay for members overseas to offset Allowances higher costs resulting from fluctuating exchange rates.
X (I)	Death Gratuity	\$6,000 paid to the beneficiary of deceased service member (\$3,000 is excluded from gross income).
X	Defense Counseling	Provided by the Armed Forces to represent military personnel in their defense before court-martial or at an investigation.

<b><u>Status</u></b>	<b><u>Pay Term</u></b>	<b><u>Definition</u></b>
X	Dislocation Allowance	Payments to defray extra costs of moving from a permanent duty station.
I	Diving Pay	Pay for diving operations.
I	Enlistment Bonus	Payable to certain “critical-skilled” enlistees upon entering the Service.
X	Evacuation Allowance	Paid to offset expenses for dependents who must leave for a place of safety.
X	Family Separation Allowance	Paid when military families are separated due to overseas assignments, for emergencies, and for certain educational expenses for dependents.
I	Flight Duty Pay	Monthly pay supplement for flight time.
I	Foreign Duty Pay	Paid to enlisted personnel serving outside the 48 contiguous state and D.C.
X	Group-term life Insurance (SGLI/VGLI)	Military life insurance.
I	Hazardous Duty Pay	Pay for hazardous duty.
I	Imminent Danger Pay	Pay for duty in an area in which soldier is exposed to hostile fire or imminent danger.
X	Interment Allowance	Burial expense allowance.
I	Medal of Honor Pension	Pension for Congressional Medal of Honor holder.
I	Medical and Dental Proficiency Pay	Pay given to certain medical and dental officers.
X	Medical Benefits	Free medical services.

<b><u>Status</u></b>	<b><u>Pay Term</u></b>	<b><u>Definition</u></b>
X	Moving and storage	In-kind transportation and storage of household goods.
I	Nuclear Qualified	Pay to certain nuclear naval officers. Officers Pay
I	Overseas Extension Bonus	Paid to certain enlisted personnel upon extending their overseas tour.
X	Per Diem	An amount paid in place of subsistence and mileage When away from permanent duty stations.
I	Personal Money Allowances	Pay to high-ranking officers to defray expenses incurred in their official positions.
X	Professional Education	Education costs paid by the U.S. Government for Armed Forces personnel.
I	Proficiency Pay	Awards to enlisted personnel who show special proficiency in a military skill.
X	Qualified Hazardous Duty Pay	Exclusion of all military pay per month for enlisted personnel and warrant officers, limited to Maximum enlisted rate plus imminent danger pay For officers.
X	Qualified Military Benefits	Any allowances or in-kind benefit paid to Armed Forces personnel or dependents that were excludable from gross income on 9 Sep 1986.
I	Re-enlistment Bonus	Multiple of monthly basic pay times additional years of reenlistment service.
X	ROTC Educational and Subsistence Allowances	Paid for education and subsistence.
X	Scholarships	Scholarships such as the FLEP, AFHSP or LL.M. programs.

<b><u>Status</u></b>	<b><u>Pay Term</u></b>	<b><u>Definition</u></b>
I	Sea Duty Pay	Paid for duty on a vessel under orders of a competent authority operating outside CONUS.
I	Separation Pay	Lump-sum payment paid upon involuntary discharge or release in certain cases.
I	Student Loan Repayment	Repayments from programs such as the General Educational Loan Repayment Program.
X	Subsistence Allowance	Paid for subsistence including basic allowance and other subsistence allowances and rations furnished in-kind to enlisted members.
X	Survivor and Retirement Protection Plan Premium	Premiums taken from the gross pay of retired personnel of the Armed Forces to provide a survivor annuity.
X	Trailer Allowance	Pay for moving a trailer from a permanent POD.
X	Uniforms (In-kind or allowances)	Uniforms furnished enlisted personnel and allowances paid to officers.
X	Variable Housing Allowance	Paid to personnel living in a high cost of living area.
X	Veterans' Benefits	Amounts paid by the Department of Veterans Affairs, generally based on a combat-related disability.
I	Veterinary Pay	Pay given to certain Veterinary Corps Officers.





# **CHAPTER K**

## **INTRODUCTION TO ESTATE PLANNING**

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# INTRODUCTION TO ESTATE PLANNING

## Outline of Instruction

### I. INTRODUCTION.

A. The need for coordinated military estate planning.

B. Understanding the estate planning process:

“The process by which an arrangement for the use, conservation, and transfer of one’s wealth is created.”

C. Primary objectives of estate planning are:

1. To secure to the property owner during his lifetime maximum benefits from the possession and use of his property, and
2. To enable that property owner to transfer that property to surviving beneficiaries with a minimum of shrinkage from death taxes and other transfer costs.

D. Goals of military estate planning.

1. Effective planning, or
2. Informed referral expertise.

## **II. ESTATE PLANNING GOALS.**

### **A. Lifetime Estate Planning.**

1. Maximize accumulation of wealth (“Estate Building”).
2. Protect estate from loss (“Asset Protection”).
  - a. Plan for contingencies.
  - b. Incapacity or disability.

### **B. Dispositive Estate Planning (“Wealth Transfer”).**

1. Provide for the transfer of property according to the decedent’s wishes.
2. Minimize delay and inconvenience.
3. Reduce administrative costs.
4. Provide liquidity during probate of the estate.
5. Reduce federal and state tax liability.
6. Provide for the care of minor children and their property.
7. Finally, the estate planner wants to prepare effective documents, which contain the client’s intent and carry out the client’s desires.

### III. ESTATE PLANNING STEPS.

#### A. Consider Ethical Preliminaries.

**"In all professional functions a lawyer should be competent, prompt, diligent, and honest. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client, except so far as disclosure is required or permitted . . ." (AR 27-26, para 6c).**

#### 1. Competence (Rule 1.1).

##### a. Legal assistance attorneys must provide competent representation.

(1) No special training required.

(2) Consists of skill, knowledge, thoroughness, and preparation necessary for representation.

##### b. Supervisors determine subordinates competency to perform duties.

##### c. Lawyers should refer matters outside their competence, i.e., complex estate planning, to specialists in the civilian community (AR 27-3, para 3-7h).

#### 2. Communication (Rule 1.4).

##### a. A lawyer must keep a client reasonably informed about the status of a matter.

##### b. A lawyer must explain a matter to a client to the extent necessary to permit the client to make an informed decision regarding representation.

##### c. Communicate effectively, use checklists (see appendices), listen to the client's desires, and establish scope of representation.

d. Competency of the client.

- (1) A lawyer shall attempt to maintain normal lawyer-client relationship with a client even if the client's ability to make decisions is impaired.
- (2) A lawyer may seek guardianship or other protective action if the lawyer reasonably believes the client cannot act in the client's best interests (Rule 1.14).

3. Conflicts of interest.

**"Conflict questions may also arise in estate planning. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise" (Rule 1.7, Comment).**

- a. Dual representation in estate planning generally accepted. Prior to undertaking representation, the lawyer should obtain each client's consent after full consultation. A sample multiple-representation letter is at Appendix A.
- b. Watch for conflicts that cannot be resolved.

4. Terminating the relationship.

- a. A lawyer may have a duty to advise a client of any changes that might defeat a client's testamentary goals (ABA Formal Op. 210).
  - (1) Ensure the client understands when the attorney-client relationship is terminated.
  - (2) "Debrief" the client.
- b. A lawyer must take reasonable steps to protect the client's interests upon termination to include giving notice and surrendering all papers and property (Rule 1.16).

5. Potential Malpractice Areas.
  - a. Faulty drafting.
  - b. Failure to revise plan.
  - c. Improper execution.
  - d. Failure to complete documents.
  - e. Failure to understand and implement substantive law.

B. Gather Information on the Client and Family.

1. Use a checklist (see Appendix B).
2. Conduct a thorough client interview using an estate-planning questionnaire (see Appendix C).
  - a. Development of a sound estate plan depends on full disclosure by the client.
  - b. The attorney should probe into the members of client's family and determine their strengths, weaknesses, and goals.
  - c. Develop and use an estate-planning questionnaire for your clients.
3. Some specific areas of inquiry.
  - a. Is client married?
    - (1) Is there an ante-nuptial agreement?
    - (2) Does the spouse have right of election?



- (3) Does the spouse have any special needs?
- (4) Is the spouse a non-U.S. citizen?
- (5) Is either spouse a domiciliary of a community property state?

b. Has client been divorced?

- (1) Review separation agreement or divorce decree.
- (2) Does ex-spouse have any claim to the estate?
- (3) Are there any children by a former marriage?

c. Does the client have children?

- (1) Are any children under a disability?
- (2) Does the client intend to benefit after-born children?
- (3) Are children all born of present marriage?

C. Obtain a Complete Inventory of Assets.

- 1. Detailed information on the client's assets (and spouse if dual representation) (See Appendix C).
- 2. Distinguish type of ownership.
- 3. Estimate present value and probable date of death value of all assets (estimate "gross estate") (See Estate & Gift Taxation outline).
- 4. Determine if any property will require ancillary probate proceedings.

5. Ascertain if there are restrictions on the ability to transfer any asset.
  6. Classify assets according to how they will be distributed.
    - a. Probate.
    - b. Non-probate property.
- D. Develop an Appropriate Estate Plan.
1. Establish client's needs and goals.
  2. The estate owner's objectives are the most important step in the estate planning process. To formulate a sound estate plan, the plan must be constructed on the foundation of the owner's objectives. See Appendix D, Beneficiary Objectives.
  3. At least five professions are involved in estate planning:
    - a. The attorney,
    - b. The accountant,
    - c. The life insurance underwriter,
    - d. The trust officer, and
    - e. The financial planner.
    - f. In addition, an investment adviser and an appraiser may from time to time become involved in the estate planning process.

- g. While each of these practitioners has different duties and responsibilities, a team approach should be encouraged. In this way, the estate owner will benefit from the expertise of each profession, and each practitioner will contribute his or her knowledge and skills to the best advantage or the public.
- 4. Suggest methods of reducing liabilities.
- 5. Consider methods to increase value of the estate or improve liquidity.
- 6. Consider using alternatives to probate.
- E. Prepare, review, and properly execute documents to implement and coordinate the estate plan.
- F. Complete the Representation.

#### **IV. MILITARY ESTATE PLANNING.**

- A. Scope of Services.
  - 1. Regulatory guidance
    - a. Army: see AR 27-3 at Appendix E.
      - (1) Estate planning services provided: see paragraph 3-6b.
      - (2) Limitations on estate planning services: see paragraph 3-6b.

“Legal assistance may be provided on other aspects of estate planning based on the availability of expertise and resources.”

- b. Navy-Marine Corps, see JAGINST 5801.2 on JAGCNet Legal Assistance Database.
  - (1) Estate planning services provided: see paragraph 7-2a-d.
  - (2) Limitations on estate planning services: see paragraph 7-2a-d.
- c. Air Force, see AF Instruction 51-504 and TJAG Policy Number 18 on JAGCNet Legal Assistance Database.
  - (1) Estate planning services provided: see AFI 51-504, paragraph 1.3.1; AF TJAG Policy No. 18, paragraph 5.
  - (2) Limitations on estate planning services: AF TJAG Policy No. 18, attachment on Will Preparation and Execution Guidelines.
- d. Coast Guard: see COMDTINST 5801.4C on JAGCNet Legal Assistance Database.
  - (1) Estate planning services provided: see paragraph 6.
  - (2) Limitations on estate planning services: see paragraph 7d.

2. Legal assistance will be provided on:
  - a. Wills.
    - (1) Testamentary trusts for the benefit of minors.
    - (2) Guardianships.
    - (3) Life insurance beneficiary designations (SGLI).
  - b. Advance Medical Directives.
    - (1) Living Wills.
    - (2) Health Care (Durable) Powers of Attorney.
  - c. Durable Power of Attorney (general or specific).
  - d. Anatomical gift designations.
3. Optional services (consult applicable service legal assistance regulation for limitations).
  - a. Wills.
    - (1) Credit Shelter or by-pass trusts.
    - (2) Use of disclaimers.
    - (3) Marital Deduction Trust.
      - (a) Qualified Terminable Interest Property (QTIP) trust.

(b) Qualified Domestic Trusts (QDOTs).

(4) Special needs trusts.

- b. Tangible Personal Property Memorandums (TPPMs).
- c. Letter or memorandum to personal representative or executor.
- d. Review and update beneficiary designations.
- e. Review and update property ownership.
- f. Mortuary planning document.
- g. Inter vivos trusts.
- h. Life insurance trusts.
- i. Probate.

B. Deployment preparation of estate planning documents.

- 1. Attorneys may draft powers of attorney and simple wills during deployment processing. They should, however, follow up to ensure that soldiers return for more complete legal assistance (AR 27-3, para 3-6b(2)(a)).
- 2. Commanders should not require soldiers to complete legal documents. Client determines whether (s)he wants legal document(s) prepared.
- 3. It is not appropriate to interview for or draft wills during deployment exercises unless it is done while maintaining client confidentiality. Moreover, there must be sufficient time to conduct an interview (AR 27-3, para 3-6b(2)(a)).

4. Priority and allocation of legal services should be based on need (AR 27-3, para 3-6b(2)(b)). When legal resources are limited, the following service members should receive priority for drafting and executing wills:
  - a. Those who have a minor child;
  - b. Those whose primary beneficiary is a minor;
  - c. Those whose net estate (excluding insurance, jointly owned property, and other non-probate property) is valued at more than \$10,000; or
  - d. Those who desire their property to be distributed in a manner different from that which would occur under the applicable laws of intestate succession or under an existing will.
5. How to handle more complex estates during deployment preparation of estate planning documents?
6. Same standards for professional responsibility apply to deployment scenarios as standard preparation of documents.

C. Preventive law programs.

1. Legal assistance offices should make an aggressive effort to ensure that service members and their families are adequately prepared for deployment (installation newspaper, command bulletin, radio, TV, Internet websites, etc.).
2. Inform service members and their families about the advisability of keeping their personal affairs current. Remind them about the need for periodically reviewing their wills, powers of attorney, and insurance beneficiary forms.
3. Unit presentations.
4. Annual legal checkups.

D. Improving Office Efficiency.

1. Specialization.
2. Referrals (see AR 27-3, para 3-7h).
3. Computer assisted wills.
4. Use handouts and videotapes.

**V. DL WILLS PROGRAM.**

A. Trusts:

1. Testamentary trusts (including for minor children).
2. Marital Deduction trust. The Marital Deduction Trust may be QTIP, QTIP with a limited power of appointment, general power of appointment, or “estate trusts.” Qualified Domestic Trust (QDOT) provisions may be included. Two marital deduction trusts may be provided to facilitate allocation of the Generation Skipping Tax exemption.
3. Credit Shelter Trusts (both formula trusts and disclaimer trust). Credit shelter trust may be pre-residuary, residuary or fractional shares of the residuary.
4. Pour-Overs to Inter vivos trusts.
5. Provisions granting or exercising powers of appointment, purchases of annuities, and charitable trusts.
6. The residuary may be divided into equal shares with each share being given to the beneficiaries outright or in a variety of trusts. Trusts may be terminated or partially liquidated at specific ages.

B. Guardian for minor children.



- C. Other options address disposition of realty, personal effects, cash bequests, sprinkling trusts, presumptions of survivorship, fiduciary bonds, disclaimers, disinheritance, pension plans, oil and mineral rights, apportionment of taxes, etc.
- D. The program also prepares:
  - 1. Advance Medical Directives (Living wills) and health care documents.
  - 2. Powers of Attorney.
  - 3. Asset summaries.
  - 4. Execution checklists.
  - 5. Tangible Personal Property Memorandums (TPPM).

## **VI. SUMMARY OF ESTATE PLANNING MULTI-STEP PROCESS**

- A. Education.
- B. Ascertain.
- C. Plan.
- D. Draft.
- E. Explain and review.
- F. Revise and refine.
- G. Execute.

## **VII. CONCLUSION.**

**APPENDIX A**  
**SAMPLE DUAL REPRESENTATION LETTER**  
**FOR NEW ESTATE PLANNING CLIENTS**

Re: Your Estate Plan

Dear Mr. and Mrs. \_\_\_\_\_:

This will confirm the following:

1. You have requested that I represent each of you and advise you on certain estate planning matters.
2. It is contemplated that the matters to which my representation will extend will include the following: (Choose from the following or modify as appropriate.)
  - a. Analysis of your existing wills, codicils, trust agreements, and property agreements if any;
  - b. Analysis of the assets owned by each of you at the time of your marriage, including consideration of the fair market value of such property and the nature in which title was then held;
  - c. Analysis of all property now owned by each of you, including consideration of its fair market value, the manner in which title to such property is now held, and a categorization of such property as separate, community, or quasi-community property;
  - d. Discussions about the manner in which you wish to dispose of any property over which you may have any power of disposition at the time of your death;
  - e. Analysis of the tax impact of such disposition and recommendations for alternative dispositions; and
  - f. Preparation of the documents necessary to accomplish the desired disposition, including the drafting of wills, trusts, property agreements, and other documents as may be required.
3. I have advised each of you that, during the course of the estate planning work, conflicts may arise between you with respect to the ownership of your property (separate, community, or quasi-community property) and its desired disposition during your lifetimes and at your deaths. Differences of opinion on the disposition of the property, under ethical rules, do not prevent me from continuing to represent both of you. However, during the course of the estate planning, conflicts of interest between you may arise, such as issues regarding the ownership of certain property.

Ordinarily, under such circumstances, one attorney cannot represent both of you. It may be better for each of you, under such circumstances, to have separate independent counsel to avoid the possibility that my advice to one of you is influenced by my representation of the other. Nevertheless, you have requested, with a full understanding of your right to, and the advantages of, independent counsel, that I represent both of you in all of the above matters.

4. Although I doubt that it will happen, if conflicts do arise between the two of you of such a nature that I believe it impossible, in my judgment, for me to perform any obligations to either of you in accordance with this letter, I will withdraw from all further dual representation of both of you in this matter at that time and advise one or both of you to obtain independent counsel.

5. You have each agreed that there will be complete and free disclosure and exchange of all information that I receive from either or both of you in the course of my representation of you, and that such information shall not be confidential between you irrespective of whether I obtain such information in conferences with both of you or in private conferences with only one of you, including any conferences that may have taken place before the date of this letter.

Sincerely,

(Attorney's Signature Block)

APPROVED THE \_\_\_\_ day of \_\_\_\_\_, 20\_\_

(Signature of husband; typed name below)

(Signature of wife; typed name below)

## **APPENDIX B**

### **ESTATE PLANNING CHECKLIST**

#### **1. General.**

- (a) Has/Have the estate(s) wisely used the marital deduction and given adequate consideration to the use of trusts that will provide income for life to the surviving spouse, but enable maximum use of the unified credit by the estate of the first spouse to die? [Failure to qualify sufficient property for the marital deduction may result in an unnecessary tax burden at the estate owner's death. Over-qualification will tend to increase the federal estate tax due upon the surviving spouse's death.]
- (b) Would a gift program be advisable?
- (c) Is either the husband or wife the current or anticipated beneficiary of other estates or trusts? Has the effect of potential inheritances been considered in the planning process?
- (d) Are there any business interests or other assets that would require immediate attention following the estate owner's death?
- (e) Has a current inventory of estate assets been prepared to assist the executor?
- (f) Are the estate owner's wishes regarding burial and other personal matters (as opposed to binding dispositions of property) reflected in a letter or written memorandum kept with other important papers?
- (g) Are liquid assets available?
- (h) Are the names of all beneficiaries correct? [This is especially important with respect to charities.]
- (i) Has the corporate fiduciary, if any, been informed of its selection, reviewed the instrument, and accepted the instrument?
- (j) Have the settlor's insurance policy beneficiaries been changed in accordance with the estate plan?  
For example, are policies made payable to the estate or the trustee if called for in the plan?)

**2. Wills and trusts.**

- (a) Have current dispositive instruments been executed by both husband and wife?
- (b) Have the formalities of execution required by the state of domicile been *met*?
- (c) Will ancillary administration be required?
- (d) If an individual executor or trustee has been notified, has he or she agreed to accept this responsibility? Have an alternate and/or a successor been designated? Will the individuals named as executor and trustee, if any, qualify under the laws of decedent's domicile?
- (e) Has a guardian been appointed (or nominated) for minor children? Will the guardian qualify under the laws of decedent's domicile?
- (f) If a corporate fiduciary has been designated, will the corporate fiduciary qualify under the laws of decedent's domicile?
- (g) Is the fiduciary to be bonded?

**3. Property ownership.**

- (a) Is title to any property held in joint tenancy with right of survivorship? Does the estate plan contemplate the fact that joint tenancies may nullify certain testamentary dispositions and may result in unintentional over-qualification for the marital deduction?
- (b) Are any assets held as community property? One-half of each asset held as community property is "owned" by each spouse by operation of law. This fact is important in valuing the estates of community property state domiciliaries.
- (c) Do the estate owners hold a beneficial or reversionary interest in any property? Such interests are easily overlooked unless specific inquiries are made. Their effect on the potential estate tax and the liquidity requirements of the estates of both husband and wife should be considered.

**4. Military, veterans, and social security benefits.**

- (a) Has a schedule of potential benefits to survivors been prepared? [The nature, amounts, and eligibility requirements for these benefits are subject to frequent modification.]
- (b) Has a survivorship annuity been elected under the Survivor's Benefit Plan?
- (c) Are beneficiary designations for all military and veteran's benefits current?
- (d) Has the estate owner been reminded that eligibility for certain social security and veteran's benefits may be forfeited if the surviving spouse supplements other income by working?
- (e) Are any benefits available to the estate owner's survivors by virtue of any civilian employment in which he or she has engaged?

**5. Life insurance.**

- (a) Has the ownership of policies on the estate owner's life been ascertained? Are contingent owners designated? Would transfers of ownership be advantageous?
- (b) Does the estate owner hold any policies on the lives of others? Would contingent ownership be advisable to keep such policies out of the estate owner's probate estate?
- (c) Are all beneficiary designations current and properly designated?
- (d) Has the use of settlement options been considered? Even when the proceeds are to be paid in a lump sum, it is often advisable for the insured to elect to have the proceeds placed under the "interest only" option, giving the beneficiary full withdrawal rights and the right to elect other options. This gives the beneficiary maximum flexibility. It assures that interest will be credited from the date of death to the date of actual withdrawal, and gives the beneficiary time to obtain advice before being required to make any irrevocable decisions with regard to the ultimate disposition of the proceeds.
- (e) Do any settlement options elected by the insured include "spendthrift" provisions?

- (f) Do policy provisions and the provisions of state law regarding presumptions as to survivorship coincide with any presumptions established in the dispositive instruments? Has a "delay" clause been considered? "Delay" clauses provide for payment to the primary beneficiary only if such beneficiary survives the insured by a specified period of time. A clause of this type is frequently used to avoid adding to the costs of probating the beneficiary's estate when the beneficiary's death occurs shortly after that of the insured. Periods of 30 to 180 days are usually specified. The proceeds will not qualify for the marital deduction, however, if the survivorship requirement exceeds 180 days.
- (g) Will policy loans or collateral assignments interfere with the planned distribution of insurance proceeds?
- (h) Have any policies on the insured's life been transferred for valuable consideration? Such a transfer may cause part of the death proceeds to be taxed as ordinary income to the beneficiary (See I.R.C. § 101(a)).
- (i) Do any policies include options, endowment features, conversion privileges, supplemental benefits, or other provisions that deserve special consideration or require action by the policy owner? An Automatic Premium Loan, for example, is included in many policies to prevent the policy from lapsing due to the insured's failure to make a scheduled premium payment prior to the expiration of the grace period. If it is not included in the policy at the time of issue, most companies will add it, without cost, at the policy owner's request.
- (j) Are policy dividends being applied under the most favorable dividend options? Which dividend option is "most favorable" will depend upon the insured's situation. If an individual's longevity is significantly impaired, he or she should consider having dividends applied toward the purchase of paid-up additional insurance.
- (k) Is additional insurance needed to ensure estate liquidity or to provide a guaranteed level of income for surviving family members? Have all aspects of the estate plan been coordinated (or reviewed) by an attorney who is thoroughly conversant with the laws of the jurisdiction in which probate proceedings will be carried out?

## Appendix C

### ESTATE PLANNING SCREENING QUESTIONNAIRE

#### PERSONAL INFORMATION

NAME: \_\_\_\_\_ DATE: \_\_\_\_\_

Circle or fill in your answers	
1. Do you have a will or trust now?	Yes      No
2. If married, is your spouse a U.S. citizen? .....	Yes      No
3. Do you have children other than from your current marriage?	Yes      No
4. Are you receiving or do you expect to receive property or money from (circle all that apply): If so, approximately how much?	Trust Inheritance Gift Lawsuit Other
5. Do own a home or other real property? .....	Yes      No
6. If you own a home or other real property, what is the approximate equity value?	\$
7. Do own investments? (stocks, bonds, mutual funds, etc...) .....	Yes      No
8. If you own investments, what is the approximate value?	\$
9. Do own life insurance?	Yes      No
10. If you own life insurance, what is the face value of all policies?	\$
11. Do you have a retirement account (401(k), TSP) or more than 20 years time in service?	Yes      No







# ESTATE PLANNING QUESTIONNAIRE

**ESTATE PLANNING** has a lasting effect on you and your family. What you do now affects what they may have after you die. Your plan may include one or more of these: Will; Advance Medical Directive (“living will”) ; Durable Power Of Attorney for Health Care; Durable Power Of Attorney in case of incompetence; Life Insurance - especially beneficiary designations; maybe a trust - possibly in a will; a Letter of Instruction, and an anatomical gift designation (often on your driver’s license).

A properly executed will leaves instructions to a probate court about your intended property distribution. It may provide simple instructions, or may contain a trust. A will is especially important for parents with young children. In this situation, you should name a guardian (and preferably a backup) for your children in case the natural parent also dies while the children are minors. You should consider naming a trustee to manage your property and properly invest on their behalf. Consider carefully who you trust with these important duties. You should also discuss your wishes with all of those named to ensure that they know that you named them, and what your desires are.

You must plan carefully and that requires you think about your situation, family, and desires. Don’t wait until that SRP to consider this important matter. Do so now while you have the time to reflect.

For more information about preparing your will read the Federal Consumer Information Center’s Life Advice publication, *Making a Will*, [http://www.pueblo.gsa.gov/cic\\_text/money/will/makewill.htm](http://www.pueblo.gsa.gov/cic_text/money/will/makewill.htm).

This questionnaire will help you organize the information that your legal assistance attorney needs to advise you and prepare your estate plan. Some individuals need very complex plans that may require you obtain assistance beyond what is available in your local legal assistance office. Your legal assistance attorney will advise you if that is necessary in your case.

**Getting Started.** You and, if married, your spouse, should read the attached questionnaire. Please bring your completed questionnaire with you when you consult with your attorney.

**NOTE:** If both you and your spouse will see the same attorney for estate planning advice, be sure to discuss dual representation waiver.

## ESTATE PLANNING QUESTIONNAIRE

### PERSONAL INFORMATION

Client's Full Name: \_\_\_\_\_ SSN: \_\_\_\_\_

Are you a U.S. citizen? \_\_\_\_ Yes \_\_\_\_ No

### **MARITAL STATUS** (select the most appropriate):

\_\_\_\_ Married once, and my spouse is alive.

\_\_\_\_ Presently married, and had a prior marriage (previous spouse is deceased or divorced).

\_\_\_\_ Widow/ widower

\_\_\_\_ Divorced, not presently married.

\_\_\_\_ Single, never married.

(if married) Full name of client's spouse: \_\_\_\_\_ SSN: \_\_\_\_\_

Is spouse a U.S. citizen? \_\_\_\_ Yes \_\_\_\_ No

Client's current address: \_\_\_\_\_

Phone #s: (home): \_\_\_\_\_ (client's office): \_\_\_\_\_ (spouse's office): \_\_\_\_\_

E-mail: (client's): \_\_\_\_\_ (spouse's): \_\_\_\_\_

[Provide only if you/your spouse authorize legal office personnel to contact you by e-mail.]

### **CHILDREN:**

How many children do you have (including adopted & stepchildren)? \_\_\_\_\_

If you have adopted children or stepchildren, do you wish to treat them the same as your natural children?

\_\_\_\_ yes \_\_\_\_ no

Is any child a minor? \_\_\_\_ yes \_\_\_\_ no

**VALUE OF ESTATE:** To determine what type of will is appropriate for you, we need an estimate of the value of your estate. For this purpose, include the value of all of the property you own in your name, and if married, the value of your spouse's property. If any of your property secures a debt (for example, a mortgage on your home), include your equity in the property. Also include the value of your life insurance policies (SGLI, VGLI, etc.). Note that life insurance ordinarily does not pass according to your will; it will go to the beneficiaries you designated on the insurance forms. However, the value of the insurance is typically included in determining whether estate taxes will apply in your case.

Approximate value of your estate (not including life insurance): \$ \_\_\_\_\_

Approximate value of your spouse's estate (not including life insurance): \$ \_\_\_\_\_

Value of life insurance (self and spouse): \$ \_\_\_\_\_

Total value of both your and your spouse's estate including life insurance: \*\$ \_\_\_\_\_

\*Note: If you think the value of your estate exceeds \$675,000 (or \$1 million if you are married), your estate may be subject to estate taxes. Complete the CLIENT & SPOUSE FINANCIAL DATA section (starting on page 12). Proper planning can help you minimize your estate-tax exposure. Depending on your estate, its complexity may exceed the expertise of the local DoD Legal Assistance Attorney. If so, we will assist you find an estate planning expert.

**FAMILY FARM/FAMILY-OWNED BUSINESS:** Do you have a farm or family-owned business? \_\_\_\_\_  
yes \_\_\_\_\_ no

**REAL ESTATE** (Frequently, a husband and wife own real estate jointly with right of survivorship. If you and your spouse own your home or other property that way, your will does not affect how your ownership interest passes when you die.)

Do you own real estate jointly with your spouse? \_\_\_\_\_ yes\* \_\_\_\_\_ no

Do you own real estate other than jointly with your spouse? \_\_\_\_\_ yes\* \_\_\_\_\_ no

If yes, how do you wish to give your real estate?

\_\_\_\_\_ All to my spouse.

\_\_\_\_\_ Different properties to different beneficiaries (below, please list each person, their relationship to you, and which property they are to receive):

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\_\_\_\_\_ To pass with the rest of my estate.

\_\_\_\_\_ My home to my spouse and the rest of my real estate to pass with the rest of my estate.

\_\_\_\_\_ My home to my spouse for as long as my spouse lives there and then my home and the rest of my real estate to pass with the rest of my estate.

\* Please bring copies of your real estate deeds to the legal assistance attorney.

**PERSONAL EFFECTS AND TANGIBLE PERSONAL PROPERTY:** How do you wish to give your personal property?

\_\_\_\_\_ All to my spouse.

\_\_\_\_\_ Specific items are to go to specific individuals, with all items not listed passing to my spouse. (Please attach detailed list of items, beneficiaries, and relationship to you.)

\_\_\_\_\_ Specific items are to go to specific individuals, with all items not listed passing with the rest of my estate. (Please attach detailed list of items, beneficiaries, and relationship to you.)

\_\_\_\_\_ To pass with the rest of my estate.

\_\_\_\_\_ Other (please explain):

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**SPECIFIC BEQUESTS:** You may make specific gifts of cash, real estate, or personal property to specific people or charities in your will. However, these bequests will be distributed first and may deplete your estate. Also, specific bequests may complicate the probate of your estate if the property given cannot be found at your death. Therefore, if you make any specific bequests, you should only give property or amounts of cash that you are reasonably sure you will have when you die. If you make no specific bequests, all of your property will pass to your primary beneficiaries. Many states allow you to make a "personal memorandum," in which you can give specific items of personal property to named beneficiaries in writing separate from your will. While in most states memorandum gifts are not legally binding, your executor will give these gifts as much weight as state law allows.

Do you wish to make any specific bequest in your will? \_\_\_\_\_ yes \_\_\_\_\_ no  
If yes, please list your specific bequest(s) and who you want to receive it (them):

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**RESIDUARY ESTATE:** Your residuary estate is whatever property remains after paying debts and expenses of administration, and any specific bequests. Because many people do not make specific bequests, the "residuary" usually describes all the property left to your beneficiaries.

To whom do you want to leave your residuary estate?

- \_\_\_\_\_ All to my spouse if he/she survives me, and if not, then to my children and issue.  
\_\_\_\_\_ A minimum bequest to my spouse, disinheriting him/her to the fullest extent of the law, with the remainder going to some other person(s).  
\_\_\_\_\_ All to one specific beneficiary other than my spouse.  
\_\_\_\_\_ To more than one beneficiary.

If you have more than one beneficiary, are they:

- \_\_\_\_\_ Specific people who are to share equally.  
\_\_\_\_\_ A group of people described as a class (e.g., "my brothers and sisters") who are to share equally.

\_\_\_\_\_ Some other unequal division between the beneficiaries (e.g., 50% to one beneficiary and 25% each to two others).

\_\_\_\_\_ Other (please explain):

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If any of your beneficiaries is a minor, at what age do you want them to receive their gift?

- \_\_\_\_\_ 18  
\_\_\_\_\_ 21  
\_\_\_\_\_ Some other age (please indicate the age): \_\_\_\_\_ (NOTE: Selecting an age greater than 21 will likely require a trust, which may cause your estate to incur additional expenses for the administration of the trust. These expenses would therefore diminish the amount available for your beneficiaries.)

**EXECUTOR:** Your Executor (or in some States, “personal representative”) ensures your estate is settled upon your death. This ordinarily involves going through “probate”, a court-administered procedure for settling an estate as provided in your will or under State law. Probate involves petitioning a court for letters of appointment, settling creditor claims, finding and distributing assets, and filing any necessary tax returns. Any adult may serve as your executor, although many States prefer or require an executor who is a legal resident of the State where probate is conducted. Therefore, if possible, you should select family members or responsible friends who are residents of the same State as your legal residence or the state where you own real estate.

Whom do you wish to have as your executor?

\_\_\_\_\_ My spouse.

\_\_\_\_\_ My spouse and a co-executor.\*

\_\_\_\_\_ My spouse and a successor executor.\*\*

\_\_\_\_\_ One executor other than my spouse.

\_\_\_\_\_ Two co-executors, neither of whom are my spouse.\*

\_\_\_\_\_ One executor and a successor executor, neither of whom are my spouse.\*\*

\*This option is not usually recommended because conflicts can arise between the executors that will complicate the administration of your estate.

\*\*The successor will act only if your first choice is unable to act as your executor.

If you named someone other than your spouse, indicate name(s) and relationship(s):

\_\_\_\_\_  
\_\_\_\_\_

**GUARDIAN:** If your children are minors when you die, and if the other natural parent is not alive or for any reason cannot act as guardian, the court will normally appoint the person(s) you name to act as legal guardian(s) of the children. The individual(s) named will have physical control and custody of the children until they reach age 18. If you are divorced, remember the court will usually appoint your former spouse to be the guardian (as the children's other natural parent) even if you provide otherwise in your will. You should still name a guardian, however, in case your former spouse dies before you or for any reason cannot act as the guardian.

Do you wish to appoint:

\_\_\_\_\_ One guardian for any child when I die.

\_\_\_\_\_ One guardian and a successor guardian.

\_\_\_\_\_ Two co-guardians.

\_\_\_\_\_ No guardian.

If you wish to appoint a guardian or guardians, whom do you wish to have named? (Please list name, relationship, & city, state of their residence):

1st choice: \_\_\_\_\_

2nd choice (optional): \_\_\_\_\_

3rd choice (optional): \_\_\_\_\_

**TRUSTS (OPTIONAL):** Instead of giving your estate directly to a beneficiary, you may give it to a Trustee, IN TRUST, for the benefit of your beneficiary/ies until he/she/they reach(es) the age you designate. The trustee will manage the trust under court supervision. Although the trustee's primary purpose is to safeguard the inheritance, the money can also be used for any beneficiary's health, education, welfare, or maintenance, at the trustee's discretion. Also, you may create a trust that "pools" your estate. Through pooling, your estate and insurance proceeds remain in a single trust until **all** the beneficiaries reach the distribution age you choose. The trustee may provide funds from the trust to each beneficiary as each has a need. Thus, not all beneficiaries will receive equal amounts from the trust. Such an arrangement is useful where some beneficiaries will likely need more financial assistance over a longer period of time than other beneficiaries will. A trust is also useful where you desire to protect the assets from third parties who may have claims against one of your beneficiaries.

For many people, a trust is unnecessary because, under the Uniform Gifts to Minors Act (UGMA) language in your will, gifts to beneficiaries under 18 (or, if you prefer, 21) will be controlled by your executor/trix initially, and guardian after probate, without establishing a trust. The executor/trix and/or guardian can still use the child's inheritance for the benefit of the child, and this is ordinarily less complicated and less expensive than a trust. Unless you have children from a prior marriage, disabled children, or a very large estate, you might prefer not to use a trust. One disadvantage, however, to the UGMA is that your estate will be divided in as many equal shares as there are minor beneficiaries designated; each beneficiary will receive the remainder of his or her share as they turn 18 or 21, at your option. In a nutshell, a trust may be more appropriate if you want the trustee/ guardian authority to spend more money on one child than another (e.g., a disabled child).

Do you want a trust? \_\_\_\_\_ yes \_\_\_\_\_ no

If yes, would this be:

\_\_\_\_\_ one trust for the benefit of all beneficiaries ("pooled" trust).

\_\_\_\_\_ individual trusts for each of the beneficiaries.

At what age do you want your beneficiaries to be when you like the trust ends?

\_\_\_\_\_ 18 \_\_\_\_\_ 21 \_\_\_\_\_ other (please designate the age): \_\_\_\_\_

Whom do you wish to name as Trustee? (Please list name and relationship):

1st choice: \_\_\_\_\_

2nd choice (optional): \_\_\_\_\_

3rd choice (optional): \_\_\_\_\_

Do you want the trustee to have the power to dissolve the trust if it becomes uneconomical to maintain it?

\_\_\_\_\_ yes (Selecting yes means that the trust assets may be under the guardian's control if the child(ren) is(are) a minor when the trust is terminated.)

\_\_\_\_\_ no

Do you want the trustee to exercise this power only if the trust is below a specific amount?

\_\_\_\_\_ yes \_\_\_\_\_ no

If so, what amount? \$ \_\_\_\_\_

**DISINHERITING SOMEONE:**

Do you wish to disinherit someone other than your spouse? \_\_\_\_\_ yes \_\_\_\_\_ no

If so, whom (please provide the name and relationship to you.)? \_\_\_\_\_

Do you wish to disinherit anyone who contests your will? \_\_\_\_\_ yes \_\_\_\_\_ no

If you wish to disinherit your spouse, do you want your executor to have the authority to distribute your property, outright or in trust, to minimize any “right of election” your spouse might have under the laws of any jurisdiction? \_\_\_\_\_ yes \_\_\_\_\_ no [Many states provide a spouse a “right of election” or the choice to apply State law instead of your will’s provision for your spouse. For example, if you left your spouse only a small amount of property, the State where your will was probated might have a law allowing your spouse to choose one-third of the estate’s value as the spousal gift instead of what you provided in your will. You may want to discuss this further with your attorney.]

**DISTRIBUTION OF ESTATE TO CHILDREN:**

With regard to minors who may inherit under your will, do you want their gifts to be:

\_\_\_\_\_ Paid at the election of the executor (the executor may pay the child some or all of the gift, at various times, as the executor sees fit, even though the child is a minor).

\_\_\_\_\_ Held in trust until the child is no longer a minor (or has reached the distribution age you specified).

If you do (or were to) have stepchildren or adopted children, would you want to:

\_\_\_\_\_ Expressly include them in your will (treat them the same as natural children).

\_\_\_\_\_ Expressly exclude them from your will.

\_\_\_\_\_ Have the will remain silent as to stepchildren and adopted children.

Is any child of yours in fact a stepchild or adopted child? \_\_\_\_\_ yes \_\_\_\_\_ no

If so, who? \_\_\_\_\_

How do you want to treat him/her/them in your will?

\_\_\_\_\_



**CHILDREN:** Please list your children's names, ages, and whether they are your biological, adopted, or stepchildren:

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**MILITARY STATUS:** I am:

- ☐ Active duty military.
- ☐ Retired from the military.
- ☐ Married to someone on active duty.
- ☐ Married to a military retiree.
- ☐ A dependent of someone on active duty
- ☐ A dependent of a military retiree
- ☐ Other (please specify): \_\_\_\_\_

If you are on active duty or are the spouse or dependent of an active duty military member, where are you, your spouse, or your sponsor stationed?

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**PRIMARY BENEFICIARIES:**

Whom do you want to receive all (or the majority) of your estate?

- ☐ My spouse, if he/she survives me, and if not, then my children.
- ☐ Disinherit spouse (to the fullest extent permitted by law).
- ☐ My children.
- ☐ My parents in equal shares, or if not, then my siblings in equal shares (please provide names and relationships):

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☐ To these beneficiaries (list name, relationship, and percentage of estate to each of the beneficiaries):

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If any of the above beneficiaries die before you and leave descendants (children/issue), do you want the share of the deceased beneficiary to pass to their issue, or to pass only to the beneficiaries you indicated above? (For example, if one of your children predeceases you and leaves children, do you want the share of your deceased child to pass to his children (your grandchildren) or to go only to your surviving children?)

\_\_\_\_\_ To the children of any deceased beneficiary.  
\_\_\_\_\_ Only to the named beneficiaries listed above.

**SECONDARY BENEFICIARIES:** If all of the primary beneficiaries you designated predecease you or die within 30 days of you, to whom do you wish to leave your estate (please provide name, relationship, and percentage of inheritance or list of which item(s) are to go to which individuals)?

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**ADVANCE MEDICAL DIRECTIVE/"LIVING WILL":** An advance medical directive or "living will" is separate from your will, but may be an important part of your estate plan. It states that in the event you have a terminal, incurable medical condition and your life is only being prolonged by means of artificially provided life support, and if you cannot communicate your desires, the living will "speaks for you" so your doctors know and can act upon, your desires regarding the termination of life support. The conditions that trigger your living will, and the extent of the medical care to be withdrawn, vary under State law. Your legal assistance attorney can help you decide which State(s) forms to prepare. Once executed, the document is effective until you revoked it, which you may do at any time by physically destroying the document, or in an emergency, by verbally revoking it before witnesses who can testify that you did in fact revoke it.

Do you want a living will? \_\_\_\_\_ yes \_\_\_\_\_ no

**SPECIAL POWER OF ATTORNEY FOR HEALTH CARE:** Another important health care document is a special power of attorney for health care. You may execute this in addition to, or instead of a living will. It appoints someone you name to make medical care decisions for you if you cannot make your own medical decisions. It applies to more situations than the living will, which addresses only continued life support if you have a terminal condition. The power of attorney for medical care gives the person you name as your agent the authority to make a wide range of medical decisions on your behalf. It also gives your agent access to your medical information and authority to fully participate with your treating physicians in deciding the care to be provided to you. Obviously, the person you designate to be your agent should be someone you trust with life and death decisions. Like the living will, the power of attorney is usually drafted in accordance with the laws of the state where you reside.

Do you want a Health Care Power of Attorney? \_\_\_\_\_ yes \_\_\_\_\_ no

Do you want your spouse to act as your agent? \_\_\_\_\_ yes \_\_\_\_\_ no

Unless you have selected your spouse to act as your agent **and** your spouse has the same address you do, please provide the name, address, phone number, and relationship of your first choice of agent:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If you have a second choice, do you want

\_\_\_\_\_ both agents to have the authority to act separately.

\_\_\_\_\_ to require both agents to act jointly unless one is incapacitated.

\_\_\_\_\_ the second agent to be as a successor, acting only if the first choice is incapacitated.

Please provide the name, address, phone number, and relationship of your second choice of agent:

\_\_\_\_\_  
\_\_\_\_\_

Do you wish to specify that you desire to donate your body organs for transplant upon death?

\_\_\_\_\_ yes \_\_\_\_\_ no

If yes, are you also willing to donate organs and tissue for medical, educational, or scientific purposes?

\_\_\_\_\_ yes \_\_\_\_\_ no

[Note: many State driver's licenses include space for you to indicate organ donation. Did you do so on your driver's license? \_\_\_\_\_ yes \_\_\_\_\_ no]

Do you wish to specify that, if possible and if it does not place an undue burden upon your family that you prefer to die at home rather than in a hospital? \_\_\_\_\_ yes \_\_\_\_\_ no

If you currently live in a state other than the one in which you are a legal resident, you may want your living will to be drafted in accordance with the laws of the state where you actually live and not your state of legal residence, because it is more likely to be used where you currently live.

The advance medical directive or living will is ordinarily drafted in accordance with the laws of the State where you currently live, because the laws of that State where you are hospitalized control the effectiveness of your living will. This may be a State other than your State of legal residence. Do you wish to have the living will governed by the laws of the State where you currently live? \_\_\_\_\_ yes  
\_\_\_\_\_ no

### **SPRINGING DURABLE GENERAL POWER OF ATTORNEY:**

Your will enables you to dispose of your property as you wish ***after*** you die. While you are living, you have the right to decide what happens to that property as long as you are of sound mind. But if you become incapacitated, whether through illness or accident, and are unable to handle your own affairs, a court order may revoke your right to manage your own money/property and appoint a guardian or conservator. To protect you from this, you may appoint an agent through a power of attorney.

A power of attorney is your written authorization for someone to act on your behalf, for whatever purpose you designate. Ordinarily, a power of attorney expires if you become mentally disabled – the time when you need help the most. A **springing, durable** power of attorney can take effect when you **become** unable to manage your own personal and financial affairs and will last as long as you are alive or until you revoke it. As long as you are mentally competent, you can revoke a durable power of attorney whenever you like simply by destroying the document. If you choose to have a springing durable general power of attorney, remember to name someone you trust as your attorney-in-fact. Your agent will have great authority over your affairs. Not only can they keep your affairs in order, but they have the potential to abuse this document at your expense and his or her gain.

Would you like a springing durable general power of attorney? \_\_\_\_\_ yes \_\_\_\_\_ no

Do you want your spouse to act as your agent? \_\_\_\_\_ yes \_\_\_\_\_ no

Unless you selected your spouse to act as your agent **and** your spouse has the same address you do, please provide the name, address and relationship of your first choice of agent:

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If you have a second choice, do you want:

- \_\_\_\_\_ both agents to have the authority to act separately.
- \_\_\_\_\_ to require both agents to act jointly unless one is incapacitated.
- \_\_\_\_\_ the second agent to be as a successor, acting only if the first choice is incapacitated.

Please provide the name, address, and relationship of your second choice of agent:

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If you selected your spouse to act as your agent, at what telephone number can her or she be reached?

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**FUNERAL ARRANGEMENTS:** You may have a strong desire regarding funeral arrangement (for example, burial or cremation). As a practical matter, your funeral arrangements may have been carried out by the time your will is read. Finding out after the fact that the arrangements were contrary to your will may cause some dismay for your survivors. Therefore, we recommend that you tell your desires to your next of kin at your earliest opportunity. If you wish, however, your preference may also be recorded in the will or in a Letter of Instruction that accompanies your will. You should tell the appropriate family members of your desires NOW!

At my death, I prefer:

- \_\_\_\_\_ To be cremated.
- \_\_\_\_\_ To have my body given for medical or scientific purposes.
- \_\_\_\_\_ To be buried at a specified gravesite or location. (Please specify location): \_\_\_\_\_
- 
- \_\_\_\_\_ To be buried at sea.
- \_\_\_\_\_ To be buried with full military honors. (You may select this option in addition to one of the above.)
- \_\_\_\_\_ Other: \_\_\_\_\_

\_\_\_\_\_ I do not wish to express my desires concerning my remains in my will and leave this decision to those who survive me.

## CLIENT & SPOUSE FINANCIAL DATA

Clients owning property that exceeds \$675,000 should complete this section jointly before seeing counsel.

1. Asset Valuation Summary. To accurately determine the estate and gift tax consequences, if any, resulting from the distribution of your property, please provide the information requested below. You need only provide approximate figures. If you prefer, you can provide us with a recent financial statement that accurately reflects the current value of your joint and individual assets and liabilities. For all property, real or personal, to include intangible property, please bring copies of deeds or other documents indicating ownership.

	<i>Joint</i>	<i>Client</i>	<i>Spouse</i>	<i>Total</i>
Checking accounts				
Savings accounts				
Residence(s) equity				
Other real estate equity				
Investments (excluding retirement benefits)				
Closely-held business(es)				
Life insurance death benefits				
Vehicles				
Other personal property (e.g., furniture, jewelry, etc.)				
Other assets (list)				
Other assets (list)				
Other assets (list)				
Total				

Have you ever filed an IRS Form 709 "U.S. Gift (and Generation-Skipping Transfer) Tax Return?"  
 \_\_\_\_\_ yes    \_\_\_\_\_ no (If so, please provide a copy.)

2. Residence Information.

A. Primary Residence: (address): \_\_\_\_\_

\_\_\_\_\_

Estimated Value	Amount of Mortgages	Equity	Monthly Mortgage Payment	Owned By (client, spouse, jointly)

(So that we can properly plan for its disposition, please provide us a copy of the deed and mortgages for this primary residence.)

Original Purchase Price: \$\_\_\_\_\_ Cost of Additional Improvements: \$\_\_\_\_\_

How long do you plan on retaining this as a primary residence? What are your plans for this property?

\_\_\_\_\_

\_\_\_\_\_

B. Secondary Residence: (address): \_\_\_\_\_

\_\_\_\_\_

Estimated Value	Amount of Mortgages	Equity	Monthly Mortgage Payment	Owned By (client, spouse, jointly)

(So we can properly plan for its disposition, please provide us a copy of the deed and mortgages for this secondary residence.)

Original Purchase Price: \$\_\_\_\_\_ Cost of Additional Improvements: \$\_\_\_\_\_

How long do you plan on retaining this as a primary residence? What are your plans for this property?

\_\_\_\_\_

\_\_\_\_\_

Do you rent out this secondary residence?

\_\_\_\_\_

3. Other Real Estate Information (other than residences).

A. Other jointly owned real estate ( i.e., in both client's and spouse's names).

Location	Estimated Value	Amount of Deeds of Trust	Equity	Other Co-Owners?
Total				

B. Other real estate owned by client only.

Location	Estimated Value	Amount of Deeds of Trust	Equity	Other Co-Owners?
Total				

C. Other real estate owned by spouse only.

Location	Estimated Value	Amount of Deeds of Trust	Equity	Other Co-Owners?
Total				

4. Investment Account Information (other than retirement accounts).

A. Jointly owned investment accounts, mutual funds, etc. (i.e., in both client's and spouse's names).

Location	Estimated Value	Amount of Margin Loans	Net Value	Other Co-Owners?
Total				

B. Investment accounts owned by client only.

Location	Estimated Value	Amount of Margin Loans	Net Value	Other Co-Owners?
Total				

C. Investment accounts owned by spouse only.

Location	Estimated Value	Amount of Margin Loans	Net Value	Other Co-Owners?
Total				



5. Retirement Benefits.

A. Client's retirement benefits.

Description	Current Value	Beneficiary
Total		

B. Spouse's retirement benefits.

Description	Current Value	Beneficiary
Total		

C. Please provide below any other information regarding retirement accounts and other deferred compensation arrangements:

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6. Liability Information.

A. Joint liabilities (i.e., those liabilities for which both client and spouse are responsible), other than those listed previously.

Creditor	Liability Amount	Payment Amount	Payment Frequency	Secured?
Total				

B. Client's liabilities, other than those listed previously.

Creditor	Liability Amount	Payment Amount	Payment Frequency	Secured?
Total				

C. Spouse's liabilities, other than those listed previously.

Creditor	Liability Amount	Payment Amount	Payment Frequency	Secured?
Total				

7. Life Insurance Information.

A. Joint life insurance policies (i.e., life insurance insuring both client's life and spouse's life). (Please indicate those policies not owned by client or spouse with "\*\*".)

Company	Type	Face Amount (Death Benefit)	Cash Surrender Value	Beneficiary
Total				

B. Client's life insurance policies; i.e., life insurance insuring client's life. (Please indicate those policies not owned by client with "\*\*".)

Company	Type	Face Amount (Death Benefit)	Cash Surrender Value	Beneficiary
Total				

C. Spouse's life insurance policies (i.e., life insurance insuring spouse's life). (Please indicate those policies not owned by spouse with "\*\*".)

Company	Type	Face Amount (Death Benefit)	Cash Surrender Value	Beneficiary
Total				

D. Please provide any other information concerning the above life insurance policies that may be helpful (i.e., outstanding policy loans, whether pledged as collateral, whether owned by a trust, whether financed under a "split dollar" arrangement, etc.).

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8. Miscellaneous Information. Please provide below any other information relating to your assets or liabilities which may have an impact on your estate planning.

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## **APPENDIX E**

### **ESTATE OWNER'S BENEFICIARY OBJECTIVES**

#### **I. ESTATE OWNERS OBJECTIVES.**

The estate owner's objectives are the most important step in the estate planning process. To formulate a sound estate plan, the plan must be constructed on the foundation of the owner's objectives.

#### **II. BENEFICIARY OBJECTIVES:**

A. Planning for the spouse: In planning for his or her spouse, the estate owner must decide how much of the estate is to be left to the spouse and the manner in which it should pass to such spouse. The following questions will help the estate owner make these decisions:

1. What portion of the estate should go to the spouse in preference to other beneficiaries? If the estate owner has difficulty arriving at a conclusion, the following subsidiary questions will be helpful.
  - a. What are the financial needs of the spouse compared to the needs of other beneficiaries?
  - b. What is the degree of love and affection for the spouse?
  - c. What are the feelings of the estate owner regarding the possibility of the spouse remarrying?
  - d. What is the likelihood the spouse will care for the children and other relatives out of the share left to such spouse?
2. Of the portion or the estate going to the spouse, should it, apart from any tax considerations, go outright or in trust? Subsidiary factors to consider are:
  - a. What is the financial ability and experience of the spouse?

- b. Would the spouse consider outright ownership to be a burden?
  - c. Does the estate owner want to control the eventual disposition of the principal not used by the spouse during such spouse's lifetime?
- 3. If there is the a trust for the spouse, then
  - a. Who is to be the trustee?
  - b. Should the spouse receive all the income currently or should income distributions be discretionary with the trustee?
  - c. Should principal be available to the spouse?
  - d. If principal is to be available for the spouse, but the spouse is not to be the trustee, should the amount of the distributions be in the sole control of the trustee or should the spouse have an independent power of withdrawal, perhaps to a specified maximum?
  - e. Should the trust continue on the same terms for the spouse in the event of such spouse's remarriage?
  - f. On the surviving spouse's death, is the balance of the trust to go to named beneficiaries or to the surviving spouse's appointees?
- 4. Should gifts of life insurance or other assets be made to the spouse during the estate owner's' lifetime or should the entire estate pass only after the owner's death?

B. Planning for the Children: The estate owner must consider questions such as the following, to formulate planning objectives with regard to children:

1. What are the financial needs of the children?
2. What portion of the estate should go to the children in preference to other beneficiaries?
3. Of the portion of the estate going to the children, should an equal share go to each child or do any of the children have special needs?
4. Should the children receive at least some benefit from the estate while the surviving spouse is still living or should they wait until both parents die?
5. Should the children's shares be placed in trust or distributed outright?
6. If there is to be a trust for the children, then
  - a. Who is to be the trustee?
  - b. Should the children receive the income currently or should income distributions be discretionary with the trustee?
  - c. At what ages should principal be distributed to the children?
7. If a child does not survive until the age of distribution, who is to receive his or her share- the child's children, the child's spouse, the estate owner's other children, or other beneficiaries?
8. If any of the children are minors, who should be nominated as the guardian of the children?



9. Should gifts be made to the children during the owner's lifetime or should the estate pass to them only on the owner's death?

C. **Other Individual Beneficiaries:** Other individuals whom the estate owner may wish to provide for may be his or her grandchildren, parents, brothers, sisters, and sons- and daughters-in-law. Also, he or she may wish to include more distant relatives such as nieces, nephews, and cousins or a good friend or loyal employee. The following are a few questions which will stimulate the estate owner's thinking in this regard:

1. Should a portion of the estate be left directly to the grandchildren even if the children survive the estate owner?
2. Are there any needs that the estate owner is supporting during his or her lifetime that will need funds after his death?
3. Are there any persons whom the estate owner wishes to "remember" in the estate plan, even in a token way, to repay a kindness or perhaps to spare a person from feeling slighted if left out?
4. To whom does the estate owner wish to leave the estate, if his or her primary beneficiaries, such as his or her spouse and issue, do not survive the owner?

D. **Charitable Beneficiaries:** A few questions should be considered to ascertain the owner's real objectives in this regard:

1. Should a portion of the estate be left on the estate owner's death to charity in preference to other beneficiaries?
2. If a part of the estate is to be left to charity, to which charities should it be left?
3. Should the charitable bequests be outright or restricted to specific purposes?
4. Should a charity be designated as a contingent beneficiary in the event the primary beneficiaries do not survive?

5. Should charitable gifts be made during the owner's lifetime?

E. Retirement Objectives: Consider objectives regarding retirement to help plan for that period of the owner's life. The following questions are useful in this regard:

1. Does the estate owner have a strong desire to retire?

2. What is his or her anticipated lifestyle during retirement?

3. How much annual income will be needed during retirement?

4. At what age would he or she like to retire?

5. To what extent is the estate owner willing to save now, to create an adequate estate for retirement, either voluntary or forced by age or disability?



## APPENDIX F

### EXTRACT OF AR 27-3

Current AR 27-3, para 3-6b provision:

(b) *Estates.* Legal assistance will be provided on wills, testamentary trusts for the benefit of minors, guardianships, and the designation of beneficiaries under life insurance policies (including the Servicemen's Group Life Insurance (SGLI)). Legal assistance will also be provided on preparing AMDs and anatomical gift designations. Legal assistance may be provided on other aspects of estate planning based on the availability of expertise and resources.

(1) Every service member for whom a will is prepared will be provided legal advice on designating beneficiaries under SGLI (or other insurance policies, as applicable) that will best carry out the service member's intent in light of his or her personal situation. As a matter of Army policy, attorneys will not recommend so-called "by-law" or "by-will" (or "to my-estate") SGLI beneficiary designations to any service member, regardless of military service affiliation. Where the insured is a soldier, "by-law" and "by-will" designations are prohibited. See AR 600-8-1 (20 Oct 94) and Appendix C of this regulation for guidance on assisting service members with SGLI beneficiary designations. Non-Army clients who indicate that they have directed their SGLI benefits to be distributed "by-law" should be advised of the effect this direction has on distribution of SGLI proceeds. In cases where an existing designation does not comport with a service member's wishes, or simply needs revision in the case of a soldier who has not replaced an existing "by-law" or "by-will" designation, the service member will be assisted on executing VA Form SGLV-8286 (Servicemen's Group Life Insurance Election and Certificate). This form may be obtained through normal publications channels. The form for soldiers will be executed in accordance with AR 600-8-1. Any designation or change of beneficiary by a soldier on a SGLV-8286 is not effective unless received by the custodian of the soldier's DA Form 201 (Military Personnel Records Jacket (MPRJ), U.S. Army) before the soldier's death. All clients should be advised to file newly executed forms in their military records. They should also be provided the telephone and room and building numbers (or address) of the custodian for those records.

(a) Attorneys who provide legal assistance should maintain sufficient copies of SGLV-8286 for use by their clients. Attorneys should not use any other form or continuation form to designate SGLI beneficiaries unless specifically approved by the proponent for AR 600-8-1 (20 Oct 94).

(b) Those providing legal assistance to soldiers during EDREs, REMOBES, MODREs, SRPs, and NEOs should request to be stationed before the personnel and finance sections so that soldiers can receive legal advice before they designate SGLI and final pay beneficiaries. This advice will be made available to soldiers regardless of whether or not wills are prepared for them.

(2) No will may be executed until an attorney interviews the client and reviews the will. An attorney shall be present to supervise the execution of the will and to review the will after the client and witnesses have signed it. The attorney who drafts the will shall insert his or her name on the will as its drafter, together with the designation for a state or other legal bar of which he or she is a member, using the following language: "This document was prepared under the authority of 10 U.S.C. § 1044 and implementing military regulations and instructions by *(name of attorney)*, who is licensed to practice law in *(name of one State or other legal bar)*."

(a) When providing routine legal assistance, attorneys should encourage eligible clients who meet any of the criteria in para 3-6b(2)(b) to obtain wills, and should provide wills to all those who request them. The same legal and professional standards that apply to preparing and executing wills within an Army legal office apply to those that are prepared and executed during EDREs, REMOBES, MODREs, SRPs, and NEOs. Where those standards cannot be met, follow-up legal assistance appointments should be made to prepare or execute wills for soldiers who need them. In appropriate cases, soldiers may be encouraged to have wills (or new wills) drafted and executed following their mobilization or deployment.

(b) During mobilization or deployment, the priority and allocation of legal resources should be based on need. The absence of a will does not make a service member non-deployable. The need for a routine will by a service member being mobilized or deployed must be weighted against the needs of other service members for wills and other legal services (for example, resolving child custody, landlord-tenant, or consumer law problems). When legal resources are limited, the priority for drafting and executing wills should be given to service members to whom any of the following applies: (1) those who have a minor child; (2) those whose primary beneficiary is a minor; (3) those whose net estate (excluding insurance, jointly-owned property, and other non-probate property) is valued at more than \$10,000 (or a higher dollar limit if applicable law allows small estate administration for estates of lesser amounts); or (4) those who desire their property to be distributed in a manner different from that which would occur under the applicable laws of intestate succession or under an existing will. The drafting and execution of wills (or new wills) for all other service members may be delayed until such time that legal resources are available following mobilization or deployment.

(c) The execution of preprinted fill-in-the-blank wills is limited to clients domiciled in states that specifically authorize the execution of such wills. If authorized by statute, a properly drafted and executed fill-in-the-blank will complies with JAGC standards.

(3) Consistent with this regulation, every effort will be made to assist PNOK in probating wills and settling estates (particularly uncontested or exempt-from-administration proceedings) of service members who die while in a military duty status. (See paras 2-5a(9) and 3-7g(2)(d)). When available resources, personnel, or expertise are insufficient to provide the legal assistance required, clients should be referred to other attorneys who provide legal assistance or to civilian lawyers in accordance with para 3-7h. Attorneys assisting a PNOK with a problem related to a service member's designation of SGLI beneficiaries should review the provisions of Chapter 38, Code of Federal Regulations, Part 9 (Servicemen's Group Life Insurance and Veterans' Group Life Insurance) for restrictions on beneficiary entitlements.

(4) Priority will be given to handling the special needs of clients with life-threatening injuries or illnesses. With regard to service members, attorneys providing legal assistance should be generally familiar with the benefits payable from the military, the Department of Veterans' Affairs, and the Social Security Administration to the survivors of service members who die while on active duty or in a retired status. They should also be generally familiar with the reasons for carrying out so-called "death-bed retirements." Assistance in such cases may be obtained from the installation Physical Evaluation Board Liaison Officer, the installation Retirement Services Officer, or Legal Assistance Division, The Judge Advocate General, 2200 Army Pentagon, Washington DC 20310-2200. See AR 600-87, appendix C for a description of the Survivor Benefit Plan, and AR 40-3, chapter 8 regarding referral of cases to physical evaluation boards.



Information for this area not available.



**CHAPTER M**

**OATHS, NOTARIZATIONS, AND POWERS OF ATTORNEY IN  
THE MILITARY**

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# **OATHS, NOTARIZATIONS, AND POWERS OF ATTORNEY IN THE MILITARY**

## ***Outline of Instruction***

### **I. REFERENCES.**

- A. 10 U.S.C. §§ 936 and 1044.
- B. AR 27-55, Notarial Services (10 April 1997).
- C. JA 272, Deployment Guide (Feb. 1994).

### **II. AUTHORITY OF U.S. MILITARY PERSONNEL TO ADMINISTER OATHS AND PERFORM NOTARIAL ACTS.**

- A. 10 U.S.C. § 1044a grants named individuals the general powers of a notary public and of a consul of the United States.
- B. 10 U.S.C. § 1044b is intended to increase the acceptability of general and special powers of attorney prepared by legal assistance attorneys for their clients.
- C. 10 U.S.C. § 1044c is intended to increase the acceptability of advanced medical directives prepared by legal assistance attorneys for their clients.
- D. 10 U.S. C. § 1044d (enacted 30 Oct. 2000) is intended to preempt state law (including Puerto Rico) testamentary requirements by forcing states to recognize Military Testamentary Instruments executed in accordance with 10 U.S.C 1044
- E. 10 U.S.C. § 936 grants named individuals power to administer oaths necessary for military administration (to include military justice) and necessary in the performance of their duties.

### III. GENERAL OVERVIEW.

- A. Authority to administer oaths and perform notarial acts may be based on state or federal law.
- B. The authority granted by federal statutes (10 U.S.C. § 1044a and § 936) to administer oaths and perform notarial acts is
  - 1. Separate and apart from, and in addition to,
  - 2. Any authority provided by state law.
- C. Oaths administered pursuant to 10 U.S.C. § 936 are legally effective for the purposes for which the oaths are administered (e.g., military administration).
- D. Notarial acts performed under 10 U.S.C. § 1044a are legally effective as notarial acts for **all** purposes in all states (pursuant to the Supremacy Clause). In the past, not all states agreed; that is why § 1044b was passed in 1994:

Recognition by States of Military Powers of Attorneys codified at 10 U.S.C. § 1044b.

(a) INSTRUMENTS TO BE GIVEN LEGAL EFFECT WITHOUT REGARD TO STATE LAW. -- A military power of attorney

(1) is exempt from any requirement of form, substance, formality, or recording that is provided for powers of attorney under the laws of a State; and

(2) shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the State concerned.

(b) MILITARY POWER OF ATTORNEY -- For purposes of this section, a military power of attorney is any general or special power of attorney that is notarized in accordance with section 1044a of this title or other applicable State or Federal Law.

(c) STATEMENT TO BE INCLUDED. -

(1) Each military power of attorney shall contain a statement that sets forth the provisions of subsection (a).

(2) Paragraph (1) shall not be construed to make inapplicable the provisions of subsection (a) to a military power of attorney that does not include a statement described in that paragraph.

(d) STATE DEFINED. -- In this section, the term 'STATE' includes the District of Columbia, the Commonwealth of Puerto Rico, and a possession of the United States.

PREScribed PREAMBLE FOR MILITARY POWERS OF ATTORNEY  
(insert at beginning of each general and special power of attorney in capital letters)

THIS IS A MILITARY POWER OF ATTORNEY PREPARED PURSUANT TO TITLE 10, UNITED STATES CODE, SECTION 1044b AND EXECUTED BY A PERSON AUTHORIZED TO RECEIVE LEGAL ASSISTANCE FROM THE MILITARY SERVICES. FEDERAL LAW EXEMPTS THIS POWER OF ATTORNEY FROM ANY REQUIREMENT OF FORM, SUBSTANCE, FORMALITY OR RECORDING THAT IS PRESCRIBED FOR POWERS OF ATTORNEY UNDER THE LAWS OF A STATE, THE DISTRICT OF COLUMBIA, OR A TERRITORY, COMMONWEALTH, OR POSSESSION OF THE UNITED STATES. FEDERAL LAW SPECIFIES THAT THIS POWER OF ATTORNEY SHALL BE GIVEN THE SAME LEGAL EFFECT AS A POWER OF ATTORNEY PREPARED AND EXECUTED IN ACCORDANCE WITH THE LAWS OF THE JURISDICTION WHERE IT IS PRESENTED.

E. Advanced Medical Directives. 10 U.S.C. § 1044c, is identical to the military power of attorney provision except it deals with advanced medical directives.

1. STATEMENT TO BE INCLUDED: 10 U.S.C. § 1044c requires similar language on all advanced medical directives as is on military power of attorneys. Substitute the words “Title 10, United States Code, Section 1044c” for “Title 10, United States Code, Section 1044b” and the words “advanced medical directive” for “power of attorney” in the above language to make this protection effective.

- F. Military Testamentary Instruments. 10 U.S.C. § 1044d require states to recognize the military will provided it includes the following language: A military testamentary instrument (1) is exempt from any requirement of form, formality, or recording before probate that is provided for testamentary instruments under the laws of a State; and (2) has the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the State in which it is presented for probate.

#### **IV. OATHS.**

- A. Oaths and affirmations are pledges where the individual making the oath swears or affirms the truth of statements made by them. Oaths and affirmations are used when taking affidavits or sworn statements and documents.
- B. Under 10 U.S.C. § 936(a) and AR 27-55, para. 3-2b, the following U.S. Armed Forces members on active duty, reservists serving on active or inactive duty for training, and Army National Guard members when serving on active duty under Title 10 U.S.C., may administer oaths for purposes of military administration, including military justice under the UCMJ:
1. All JAs and legal officers of the Army.
  2. All summary courts-martial.
  3. All adjutants, assistant adjutants, acting adjutants, and personnel adjutants.
  4. All commanding officers of the Navy, Marine Corps, and Coast Guard.
  5. Persons empowered to authorize searches pursuant to MRE 315(d), MCM, 1984, for any purposes relating to search authorizations.
  6. All other persons designated by Armed Forces regulations or by statute.

- C. Under 10 U.S.C. § 936(b) and AR 27-55, para. 3-2c, the following U.S. Armed Forces members on active duty, reservists serving on active or inactive duty for training, Army National Guard members when serving on active duty under Title 10 U.S.C., may administer an oath to any person when it is necessary in the performance of their duties:
1. President, military judge, trial counsel and assistant trial counsel, for all general and special courts-martial.
  2. President and counsel for any court of inquiry.
  3. All officers designated to take a deposition.
  4. All personnel designated to conduct an investigation.
  5. All recruiting officers.
  6. All other persons designated by regulations of the armed forces or by statute. [i.e., Civilian personnel officers and designated representatives]
- D. Other Statutory Oaths. Any U.S. Armed Forces commissioned officer of any Regular or Reserve component, whether or not on active duty, may administer:
1. Oath of enlistment (10 U.S.C. § 502).
  2. Oath required for the enlistment or appointment of any person in the Armed Forces (10 U.S.C. § 1031).
  3. Any other oath required by law in connection with enlistment or appointment of any person in the Armed Forces (10 U.S.C § 1031).
- E. Procedures.
1. Oaths administered for military justice matters should be administered according to AR 27-10, chapter 11.

2. All other oaths should be administered as described in AR 27-55, para. 4-4.

## V. NOTARIAL ACTS.

A. Under the authority of 10 U.S.C. § 1044a and AR 27-55, para. 2-2a, the following persons have the general powers of notary public and of a consul of the United States in the performance of all notarial acts to be executed by any of the individuals listed in paragraph B below:

1. Civilian attorneys serving as legal assistance officers.
2. All active duty and reserve component judge advocates and warrant officers with a primary MOS of 55A; **NOTE:** Reserve component judge advocates and warrant officers may perform notarial services even in a non-duty status.
3. All adjutants, assistant adjutants, and personnel adjutants;
4. All other persons who are designated by regulations of armed forces or by statute to have those powers.
5. The following also qualify as military notaries with the following restrictions pursuant to AR 27-55:
  - a. Active duty and reserve component NCOs (including corporals) and legal specialists (authorized by their supervising SJA pursuant to para. 1-6) who -
    - (1) Possess a primary MOS of 71D; **AND**
    - (2) Serve under the immediate supervision of a judge advocate or DA civilian attorney employee;

- b. NCOs E6 and higher with primary MOS of 71D assigned as legal NCO to a brigade or higher unit even if not under the immediate supervision of an attorney.
- c. Active duty and reserve component E3 and E4 legal specialists with a primary MOS of 71D may serve as military or civilian notaries when the SJA certifies in writing to the Legal Assistance Policy division that:
  - (1) the soldier possesses appropriate judgment and maturity;
  - (2) the soldier is serving under the immediate supervision of a judge advocate or DA civilian attorney; AND
  - (3) the soldier is trained pursuant to AR 27-55.

**NOTE: ENLISTED RESERVE COMPONENT NOTARIES CANNOT PERFORM NOTARY SERVICES IN A NON-DUTY STATUS WITHOUT THE AUTHORIZATION OF THE RESERVE COMPONENT SJA.**

- d. All DA civilian attorney employees.

B. Individuals listed in paragraph A above may perform notarial acts for the following:

- 1. Members of **any** armed forces;
- 2. Other persons eligible for legal assistance under the provisions of section 1044, AR 27-3, or regulations of the Department of Defense;
- 3. Persons serving with, employed by, or accompanying the armed forces outside the U.S. and outside the commonwealth of Puerto Rico, Guam, and the Virgin Islands;
- 4. Other persons subject to the UCMJ outside the U.S.



- C. In accordance with 10 U.S.C. § 973b, AR 27-55 prohibits active duty commissioned and warrant officers from obtaining or retaining commissions as civil notaries. (This prohibition does **not** affect the authority of an officer to serve as a civil notary under state law - the laws of most states authorize certain U.S. Armed Forces members to provide notarial services within the military without obtaining commissions or appointments as civil notaries).

## VI. NOTARIAL CERTIFICATIONS AND CONTENTS OF OATH.

- A. 10 U.S.C. § 936: The signature of the officer taking acknowledgments or sworn instruments, together with the title of his or her office, is prima facie evidence of the officer's authority, and an impressed or raised seal is not required.
- B. 10 U.S.C. § 1044a: The signature of any such person acting as notary, together with the title of that person's offices, is prima facie evidence that the signature is genuine, that the person holds the designated title, and that the person is authorized to perform a notarial act. A seal of any kind is not necessary.
- C. Notarization vs. Certification: There is a difference!
  - 1. NOTARIZATION: The notary signature and seal (if required) just indicate that the person purporting to sign the document appeared before the notary, produced identification or was known personally by the notary, and signed the document in the presence of the notary.
  - 2. CERTIFICATION: Signifies that the document is an accurate and complete and copy of the original document. Most public records and documents like marriage licenses, birth certificates, divorce decrees, titles, etc. are recorded in public offices and those offices certify copies.
  - 3. AR 27-55, para 4-5 prohibits notaries from certifying copies of public documents or records **except in the following circumstances**:
    - a. Military finance purposes or personnel purposes;
    - b. Federal administration where authorized by law or regulation. Examples are certain Veterans Administration benefits or Immigration and Naturalization Service documents.

- c. The military notary **must** indicate that these copies are certified for a limited purpose. (for example: certified copy for VA)

## **VII. POWERS OF ATTORNEY. (POA)**

### **A. Definition.**

- 1. A written instrument executed by one person, the principal,
- 2. Designating another individual, the agent or "attorney-in-fact,"
- 3. To perform specified acts on the principal's behalf.

### **B. Purpose.**

- 1. To notify third parties of the agent's authority.
- 2. Powers of attorney are usually designated as either "special" or "general" depending on the specified act(s) or kind(s) of act(s) for which authority to act on behalf of the principal has been given.

### **C. Overview of Dangers.**

- 1. Execute only when a reasonable or immediate need for the instrument exists.
- 2. No law requires third parties to recognize the authority of the agent to act on the principal's behalf as set forth in the POA; however, the majority of persons, businesses, and institutions will do so.
- 3. Personnel should be fully advised of the inherent dangers involved in granting to another the authority to act in their stead.

### **D. Special Powers of Attorney.**

1. Any POA can be dangerous to the grantor if improperly used.
2. To reduce the risk, a special POA should be used whenever it can fulfill the needs of the client, because the power or authority given is limited to the specific act or acts described in the instrument.

E. General Powers of Attorney.

1. General POAs giving broad powers and authority to the attorney-in-fact can be dangerous instruments in the hands of persons inexperienced in business matters, persons of unstable temperament, or anyone in whom the grantor does not have the utmost trust and confidence.
2. The possibility of strained marital relations should be considered.
3. General POAs **will not** be notarized until a legal assistance attorney or a civilian attorney has counseled the prospective grantor on the dangers of executing such a document and has ascertained that a special or limited POA would not accomplish the purpose for which the general POA was requested. [AR 27-55, para. 3-4a (11)]
4. Under no circumstances should an unrestricted general POA be used or produced unless it contains a specific termination date or other provisions for revocation.

F. Termination or Revocation.

1. If no expiration date is contained in the POA, it continues in effect until statutory provisions for termination, operation of law (i.e., death of the principal or agent), or an act of the principal or agent evidencing intent to revoke the power.
2. It is advisable to insert a termination clause in all POAs; for example, the principal may want the power to expire on or about the date of his or her expected return from an overseas tour of duty. This prevents the POA from being indefinite in duration and terminates it on a specific date, unless sooner revoked.

3. If no termination date is inserted in a POA or if the principal wishes to revoke the power prior to its stated termination date, notice of the revocation must be given to the agent.
  - a. Such notice preferably should be in writing, although it may be made orally, and
  - b. The agent then should be requested to acknowledge receipt of such notice.
4. Ordinarily, the revocation takes effect as soon as it is communicated to the agent.
5. As to third persons that have dealt with the agent, the revocation takes effect when they receive notice of the revocation.
6. Where a statute provides for the recording and revocation of POAs, third parties that do not have notice of an unrecorded revocation may be justified in relying on the continuance of the authority as recorded.
7. Additionally, in some states, the POA terminates upon the incapacity of the grantor, notwithstanding that the POA has no termination date or the termination date is subsequent to the date upon which the incapacity occurs.

G. Durable Powers of Attorney.

1. Durable POA is a special agency relationship that remains valid and operative despite the incapacity of the principal.
2. Under the common law, a POA becomes inoperative upon the disability of the principal. State statutory law has remedied this by giving powers to agents to act even during the incapacity of the principal.
3. Guardianship and conservatorship are a separate legal status that can conflict with the durable POA. Each state's separate rules control as to the relationship between these powers.

4. The lack of federal law dealing with durable POAs is a continuing problem.
  - a. Since there is no federal law on the subject, state law controls, and can be in the form of either state common law or state statutes.
  - b. Some statutes require the word "durable" to create a power that is capable of surviving the disability or incapacity of the principal.
  - c. The problem of having several different states [X, Y, and Z, for example], involved is a conflict of laws question. The Restatement of the Conflict of Laws 2d § 291 states:

The rights and duties of a principal and agent toward each other are determined by the local law of the state, which, with respect to the particular issue, has the most significant relationship to the parties in the transaction.....

- d. Another possible conflicts problem is the validity of the agent's acts. According to The Restatement on Conflict of Laws 2d § 292, the validity of the agent's acts is determined by the law of the state that has the most significant relationship to the parties and the transaction. In any case, a choice of laws clause should be included.

H. Using Powers of Attorney for Child Care - FAMILY CARE PLANS [See, AR 600-20. Interim Chi. 102 (1 Apr 92), para 5-5].

1. Mission, readiness, and deployability needs especially affect Active Component (AC) and Reserve Component (RC) single parents and dual military couples with dependent family members.
2. AR 600-20, Interim Chi. 102, requires those soldiers to implement a Family Care Plan to provide for the care of their family members when military duties prevent the soldier from doing so.
  - a. Plans must be made to ensure dependent family members are properly and adequately cared for when the soldier is deployed, on TDY, or otherwise not available due to military requirements.

- (1) RC soldiers are subject to these policies and regulations, and will implement plans during any periods of absence for Annual Training, regularly scheduled unit training assemblies, emergency mobilization and deployments, or other types of active duty.
  - (2) All married soldiers who have dependent family members are encouraged, even if not required by the regulation, to complete and maintain a Family Care Plan.
- b. Commanders are responsible for ensuring that affected soldiers complete the Family Care Plan.
- c. Affected soldiers are considered nondeployable until a Family Plan is validated and approved.
- d. The DA Form 5305-R (Family Care Plan) is the means by which soldiers provide for the care of their family members when military duties prevent the soldier from doing so.
  - (1) DA Form 5305-R (Family Care Plan) must include:
    - (a) Proof that guardians and escorts have been thoroughly briefed on the responsibilities they will assume for the sponsor/soldier and on procedures for accessing military and civilian facilities and services on behalf of the dependent family members of the sponsor/soldier,
    - (b) Attestation that the guardian and escort agree to provide care and have been provided all necessary legal authority and means to do so.
  - (2) Proof of the foregoing will consist of (as a minimum) attachments to the DA Form 5305-R:

- (a) DA Form 5841-R (Power of Attorney), or equivalent delegation of legal control, which the legal assistance office prepares, the soldier executes and has notarized, and the guardian/escort receives,
  - (b) DA Form 5840-R (Certification of Acceptance as Guardian or Escort) which the guardian/escort completes, has notarized, and returns to the soldier,
  - (c) DD Form 1172 (Application for Uniformed Service Identification Card DEERS enrollment) which the soldier executes for each dependent family member (AR 600-8-14 directs that ID cards will be issued for children under age 10 who reside with a single parent or dual military couple),
  - (d) DD Form 2558 (Authorization to start, stop, or change an allotment for Active Duty or Retired Personnel) which the soldier executes, or other proof of financial arrangements for the care of dependent family members, and
  - (e) Letters of Instruction executed by the soldier which contain additional pertinent information for escorts, temporary or long-term guardians.
- (3) DA Forms 5304-R, 5305-R, 5840-R and 5841-R will be locally reproduced.
  - (4) Forms and sample Letter of Instruction contained in 102, AR 600-20.

#### I. Extension of Powers of Attorney if POW/MIA.

- 1. 1991 SSCRA Amendments extended coverage of 50 U.S.C. app. § 591 to soldiers missing in action (MIA). POAs are automatically extended if:
  - a. The POA was executed by an individual who is in missing status;

- b. The POA designates the spouse, parent or other named relative as attorney-in-fact, and;
  - c. The POA expires by its own terms after the person entered missing status.
- 2. NOTE: The SSCRA provision does not cover Prisoner of War (POW) status!
- 3. The POA forms commonly used within the military will contain a POW-MIA clause.

## **VIII. CONCLUSION.**





# **CHAPTER N SURVIVOR BENEFITS**

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# **SURVIVOR BENEFITS**

## **OUTLINE OF INSTRUCTION**

### **I. REFERENCES.**

- A. Army Reg. 37-104-1, Payment of Retired Pay to Members and Former Members of the Army (15 Sep 1990).
- B. Army Reg. 600-8-1, Army Casualty Operations/Assistance/Insurance (24 Oct 1994) (Supersedes old AR 608-2 (SGLI) and DA Pam 608-33 (Casualty Assistance Handbook).
- C. Army Reg. 930-4, Army Emergency Relief (30 Sep 1994).
- D. DA Pamphlet 360-526, The Transition to Civilian Life (Rev. 1992).
- E. SBP Made Easy (published by The Retired Officers Association, 201 North Washington St., Alexandria, VA 22314-2529).
- F. DA Pamphlet 608-4, A Guide for the Survivors of Deceased Army Members (23 Feb 1989).
- G. Veterans Benefits Manual (Vols. I and II, 1991), The National Legal Services Project, 2001 S Street NW, Suite 610, Attn: Publication Sales, Washington, DC 20009.
- H. Reserve Retirement Benefits (1992), The Retired Officers Association.
- I. AFBA Financial Planning Guide, Armed Forces Benefit Association, 909 N. Washington Street, Alexandria, VA 22314-1556.
- J. Army and Air Force Mutual Aid Association, Fort Myer, Arlington, VA 22211-5002.
- K. Army Reserve Personnel Center, 9700 Page Blvd., St. Louis, MO 63132-5200.

## **II. THE RELEVANCE OF SURVIVOR BENEFITS.**

- A. What Are Survivor Benefits?
- B. Situations Requiring an Understanding of Survivor Benefits.
  - 1. Lifetime planning.
    - a. Insurance needs.
    - b. The Survivor Benefit Plan.
  - 2. Deathbed planning.
  - 3. Casualty assistance.
- C. References.
  - 1. Publications.
  - 2. The Army and Air Force Mutual Aid Association is available to assist by producing a benefits comparison tailored to the soldier's circumstances.
  - 3. Websites (DFAS, VA, Private Organizations, etc.).

## SURVIVOR BENEFITS

<b><u>Monthly Payments</u></b>	<b><u>Lump Sum Payments</u></b>	<b><u>Other Benefits</u></b>
<b>DIC</b>	<b>SGLI</b>	<b>BURIAL REIMBURSEMENTS</b>
<b>SBP</b>	<b>DEATH GRATUITY</b>	<b>RELOCATION</b>
<b>SOCIAL SECURITY</b>	<b>SOC. SEC.</b>	<b>MEDICAL CARE</b>
<b>DEA</b>	<b>UNPAID PAY/ALLOWANCES</b>	<b>PX/COMMISSARY</b>
		<b>EMERGENCY \$</b>

**III. DEPENDENCY AND INDEMNITY COMPENSATION (DIC) 38**  
U.S.C. §§ 1301-1322; 38 C.F.R. PART 3; INCLUDES COLAS THROUGH  
1 JUN 99.

A. Conditions for Payment.

1. Active Component.

- a. Death on active duty, by service-connected injury or disease, and not due to member's willful misconduct. If death occurs on active duty, a presumption arises that death was service-connected.
- b. Death after active duty from service-connected causes, not due to member's willful misconduct.
- c. Death after active duty not due to service-connected causes and not due to member's willful misconduct if decedent held a total service-connected disability rating.

2. Reserve Component.

- a. "Active Duty" includes AD, ADT, and IDT. However, if death occurs in connection with IDT, only IDT deaths due to injury (not illness) are covered; and
- b. Periods of travel to and from AD, ADT, and qualifying IDT are included, but only if travel accomplished by most direct means.

3. "Service connection."

4. Death or injury cannot be due to member's "willful misconduct."
  - a. Willful misconduct involves deliberate or intentional wrongdoing with knowledge of or wanton disregard of consequences.
  - b. Requires proximate cause to injury, disease, or death to prohibit payments.
5. The Department of Veterans Affairs makes the ultimate determinations on service-connection and "willful misconduct" for purposes of DIC. Appeal is to the Court of Veterans Appeals.

B. Beneficiaries.

1. DIC to widow(er).
  - a. Spouses must have continuously cohabited since date of marriage.
  - b. Any separation not due to fault of surviving spouse; temporary separations disregarded (38 C.F.R. §§ 3.52 and 3.53).
  - c. Fraudulent marriages. Generally, for soldiers that separate from active duty, subsequently marry, and then die under circumstances described in paragraphs A.1.b. and A.1.c. above, the marriage must:
    - (1) have begun within 15 years after separation from active duty;
    - (2) have existed for at least one year; or
    - (3) produced a child (38 C.F.R. § 3.54(c)).

- d. Before 01 October 1998, DIC was paid for life unless remarriage occurred.
  - (1) A widow(er) lost entitlement to DIC upon remarriage regardless of age.
  - (2) DIC would not be reinstated if second marriage were terminated through divorce or through death of second spouse.
- e. As of 01 October 1998, the eligibility of certain remarried surviving spouses can be reinstated for DIC upon termination of that marriage. 38 U.S.C. § 1311.
  - (1) The remarriage of the surviving spouse shall not bar DIC if the remarriage is terminated by death, divorce, or annulment unless it is determined the divorce or annulment was secured through fraud or collusion.
  - (2) If the surviving spouse ceases living with another person and holding himself or herself out openly to the public as that person's spouse, the bar to granting that person DIC as the surviving spouse shall not apply.
  - (3) The first month of eligibility for DIC will be the later of the month after the month the termination of such remarriage or the month of the cessation living with another person and holding himself or herself out openly to the public as that person's spouse.
  - (4) No payment may be made for any month before October 1998.



- f. For deaths occurring before 1 January 1993, monthly spousal payment depends on the rank of deceased at death (Note the below numbers are adjusted for inflation annually):

E9 - \$1,119*	W4 - \$1,090	010- \$2,083**
E9 - \$1,038	W3 - 1,031	010- 1,943
E8 - 995	W2 - 1,001	09 - 1,771
E7 - 942	W1 - 962	08 - 1,653
E6 - 911		07 - 1,509
E5 - "		06 - 1,369
E4 - "		05 - 1,239
E3 - "		04 - 1,125
E2 - "		03 - 1,063
E1 - "		02 - 995
		01 - 962

\* Veteran who served as Sergeant Major of the Army or Marine Corps, Senior Enlisted Advisor of the Navy, Chief Master Sergeant of the Air Force, or Master Chief Petty Officer of the Coast Guard.

\*\* Veteran who served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army or Air Force, Chief of Naval Operations, or Commandant of the Marine Corps.

- g. For deaths occurring on or after 1 January 1993, the Veterans' Benefits Act of 1992 mandates a flat monthly payment, currently \$911.

## 2. DIC to children.

- a. Children are broadly defined: Legitimate, adopted, stepchildren in household, or illegitimate if acknowledged or judicially decreed (38 C.F.R. § 3.57).
- b. Must be unmarried and under age 18, or under age 23 if in school.
- c. Amounts payable (children in the custody of a surviving eligible spouse).
  - (1) Under age 18 - \$229 per child (Veterans' Benefits Act of 1992).

- (2) Age 18 to under age 23 (in school) - \$194 per child unless child is receiving Chapter 35 benefits (Dependent's Educational Benefits).
    - (3) Disabled child - \$386 per child.
  - d. Amounts payable (if no surviving eligible spouse). DIC is calculated on the basis of the total number of eligible children.
    - (1) One child - \$386.00.
    - (2) Two children - \$556.00.
    - (3) Three children - \$723.00.
    - (4) Each additional child adds \$140.00.
    - (5) Additional sum will be paid for a disabled child over the age of 18 (\$229).
- 3. DIC to parents (38 U.S.C. § 1315).
  - a. Must have been dependent on deceased.
  - b. Parent(s) must be below income ceiling.
  - c. Amounts paid based on number of parents surviving.

C. Tax Consequences.

- 1. Not includable in decedent's gross estate.
- 2. Not taxable income to the recipient.

D. Application.

1. Apply to VA within 12 months to receive full payment from date of death (VA Form 21-534, Application for DIC).
2. If application is received by VA more than 12 months after death, payments are retroactive to date of application only (38 C.F.R. § 3.400).

**IV. SURVIVOR BENEFIT PLAN (SBP) (10 U.S.C. §§ 1447-1460B).**

A. Eligibility to Participate.

- a. Active duty retired.
- b. Active duty and eligible to retire.
- c. Retired with 30% or more disability.
- d. Reservists eligible to retire (includes Army National Guard). (See Pub. L. No. 95-397, 1 Oct. 1978, extended coverage (RC-SBP) to Reserve soldiers completing 20 years, but not yet 60 years of age).

B. Eligible Beneficiaries for SBP and RC-SBP.

1. Widow(er). 10 U.S.C. § 1447(3).
  - a. Defined. A spouse who survives a military retiree where the marriage either:
    - (1) was in effect when soldier became eligible to receive retirement pay,
    - (2) was in effect for at least one year immediately before retiree's death, or

- (3) produced issue.
- b. Remarriage before age 55 terminates the SBP annuity. Annuity may be reinstated if widow(er)'s second spouse dies or there is a divorce.
- 2. Former spouses.
- 3. Widow(er) and children. Full payment made to widow(er) as long as eligible; then full payment made to remaining eligible children as a group. Child eligibility:
  - a. Child under age 18 and unmarried.
  - b. Unmarried and under 22 if a full-time student.
  - c. Incapacitated before 18 or 22 - paid for life.
- 4. Children only. Usually elected when there is no eligible spouse.
- 5. Natural person with an insurable interest.
  - a. Any person with a financial interest in survival of the soldier.
  - b. This option may not be elected by eligible participants who are married or have children.

C. Annuity Amount.

1. If soldier elects to participate in SBP, soldier then selects a "base" amount. The base amount can be anything from \$300 to the full amount of soldier's retired pay. The soldier also selects a beneficiary (discussed later), which in most cases will be the spouse. The soldier then has a premium deducted from each retirement check, and if the soldier dies before the spouse (or other eligible beneficiary), the beneficiary will begin receiving the monthly SBP payments.
2. If deceased became retirement eligible after 1 October 1985, the widow(er) receives an annuity calculated under a two-tiered system.
  - a. Payments 55% of base.
  - b. Payments reduced to 35% when widow(er) reaches 62, unless supplemental coverage also is chosen.
  - c. Example: Base Amount = \$2,000.  
  
$$55\% \times \$2,000 = \$1,100 \text{ before age 62.}$$
$$35\% \times \$2,000 = \$ 700 \text{ age 62 \& older.}$$
3. If deceased was eligible to retire before 2 October 1985, SBP payments to a widow(er) will also be reduced. Widow(er) may elect to have the reduction calculated under either the new two-tier system or under the old "social security offset."
4. Supplemental SBP (SSBP).
  - a. A retiree may elect to pay an additional premium to raise annuity payments above 35% of the base amount when widow(er) reaches age 62. Under SSBP, payments may be made at 40%, 45%, 50%, or 55% of base amount.
  - b. The additional cost is determined in accordance with actuarial principles.

5. Payment to all other beneficiaries (nonspouses) is at 55% of base for as long as they maintain eligibility.

D. Active Component Cost for SBP Coverage.

1. Determine desired base.
  - a. Minimum = \$300.00.
  - b. Maximum = full retired pay.
  - c. Any amount in between.

2. Determine type of coverage.

a. Widow(er)-only coverage.

(1) Formulas:

(a) 2.5% of first \$484, plus 10% of selected base over \$484 (OLD Formula); or

(b) Flat 6.5% rate of full base amount (NEW Formula).

(2) Example: Base Amount = \$2,000.00.

(a) Old Formula:

$$\begin{array}{rcl} 2\frac{1}{2}\% \text{ of } \$484 & = & \$12.10 \\ 10\% \text{ of } \$1,516 & = & \$151.60 \\ \text{monthly cost} & = & \$163.70 \end{array}$$

(b) New Formula:

$$\$2,000 \times 6.5\% = \$130.00$$

(3) The formula producing the least amount of cost will be used. In the example, the new formula produces the least cost. As a rule of thumb, if the base amount exceeds \$1,037, then the new formula is used; if the base amount is less than \$1,037, the old formula is used.

(4) For those entering the service on or after March 1, 1990, only the new formula (flat 6.5% of base) will be used.

- b. Widow(er) plus children coverage.
  - (1) Cost of widow-only coverage, plus
  - (2) Actuarial amount that accounts for the difference in age between the retiree and the spouse and the age of youngest child.
- c. Children-only coverage. Cost is based upon actuarial tables comparing the ages of the retiree and the youngest child. If married at time of election, spouse must approve in writing.
- d. Former spouse coverage. Cost and annuities for former spouse elections made before 1 Mar 1986, are computed by the same formula used to compute costs and annuities for insurable interest coverage. For former spouse elections effected on or after 1 Mar 1986, costs and annuities are computed by the same formula used to compute costs and annuities for spouse coverage (10 U.S.C. § 1450(a)).
- e. Natural person with insurable interest (10 U.S.C. § 1448(b)(1)).
  - (1) By statute, this can only be elected if retiree has no spouse or dependent children (*Cf.* Comp. Gen. B-179465, 1974 WL 7682, which allowed this coverage for a child).
  - (2) Cost is 10% of base amount plus 5% of base amount for each five years beneficiary is younger than retiree (to a maximum of 40% of base amount).
- 3. Withholding stops if the beneficiary dies or otherwise loses eligibility. Must notify finance office.
- E. Reserve Component Cost for SBP (see Appendix A).



F. Election.

1. Soldiers who are on active duty and have completed 20 years of active federal service are automatically enrolled in SBP without any affirmative election. Enrollment is at the full base amount of retired pay calculated as if the soldier had been retired on the day of death. Both widow(er) and children are covered (10 U.S.C. § 1448(d)). Retirees, however, must make an election to participate in SBP.
2. Active Component: Retired soldiers must elect type and amount of coverage within 30 days of retirement.
3. Reserve Component: Retirement eligible reservists have 90 days to elect, with the period running from receipt of their letter of notification of eligibility for retired pay at age 60 ("20-year letter").
4. An election of no coverage, less than full coverage for a widow(er), or children-only coverage requires written spousal concurrence.
5. If a soldier is married at the time of retirement, the election made is generally irrevocable. However:
  - a. Can withdraw from the SBP between second and third anniversary from date of enrollment with concurrence of spouse and/or notification to former spouse. 10 U.S.C. § 1448a.
  - b. An eligible participant need not continue premium payments if beneficiaries are no longer eligible.
  - c. An eligible participant who has spousal coverage and loses spouse to death or divorce may withdraw after remarrying. Finance must be notified of intent to withdraw, however, before second marriage produces issue or reaches its first anniversary.
  - d. An eligible participant who becomes permanently and totally disabled may withdraw.
6. An unmarried soldier who retires and later marries and/or acquires dependent children may opt into the plan at that time.

G. Spousal SBP Reduction Due to DIC Offset.

1. Any SBP or RC-SBP annuity to which surviving spouse is entitled will be reduced by amount of spousal DIC entitlement. The offset is mitigated, however, by a pro rata, lump sum return of SBP premiums paid (10 U.S.C. § 1450(e)).
2. Any SBP or RC-SBP annuity payable to other beneficiaries is not reduced, even if that beneficiary is also eligible for DIC.

H. SBP Tax Consequences (Federal).

1. Amounts withheld (premium payments) are not reportable as income for tax purposes (I.R.C. § 122).
2. Payments to beneficiaries are taxable as ordinary income.
3. The present value of the SBP annuity could be subject to federal estate tax in the retiree's estate.

I. Paid up coverage under SBP. (P.L. 106-65, October 5, 1999).

1. 30 years of SBP premiums paid.
2. Over 70 years of age.
3. Effective date: 01 October 2008.

J. SBP Tax Consequences (state).

K. Advantages of SBP (in comparison with commercial life insurance). There are basically three commercial insurance alternatives to SBP: annuities, term life insurance, and universal/whole life insurance. For various reasons, commercial insurers do not pitch annuities as replacements for SBP. Rather, they recommend term, whole life, or some combination of the two. Upon the retiree's death, the surviving spouse is supposed to collect the lump sum insurance proceeds, invest them, and draw a monthly check from the investment (see reference in para I.G. for computer program comparing term life to SBP). This paragraph contains a list of factors that might favor SBP in such an analysis.

1. Government subsidized; no administrative costs or commissions.
  - a. Premium costs for children coverage and small amounts of widow(er) coverage are particularly low. A fantastic bargain if child is incapacitated - child paid for life.
  - b. SSBP and natural persons with insurable interests not so subsidized.
2. SBP premiums are not taxable income to the retiree.
3. SBP payments to beneficiary increase with cost of living adjustments to retired pay. A significant factor if significant inflation returns anytime in the next 40+ years.
4. Guaranteed insurability.
5. Commercial insurer more likely to go out of business than the government.
6. Value of SBP increases when factors exist which increase the probability retiree will not outlive spouse. Some factors include:
  - a. Retiree is older than spouse;
  - b. Retiree has poorer health or a less healthy lifestyle than spouse (i.e., smoker); and

c. Retiree is male (vs. female).

L. Disadvantages of SBP in comparison with commercial life insurance.

1. SBP is subject to change by Congress.
2. Reduction in spousal SBP (e.g., 55% to 35%) at age 62 (but SSBP is available).
3. Factors exist that increase likelihood retiree will outlive spouse (e.g., retiree is female; younger than spouse; or spouse has a less healthy lifestyle).
4. Limited revocation period. You can only withdraw from the program between the second and third anniversary from the date of your enrollment. For example, if you retired and enrolled on 1 January 1998, you will only be able to withdraw from SBP during the period from 1 January 2000 to 31 December 2000. (Note that you will also stop making payments should you no longer have a covered beneficiary – i.e., divorce, death of spouse, etc.).

M. Participation statistics.

1. Officers enroll at a higher rate than NCOs.
2. In fiscal year 1996, 64% of all service members elected to participate in SBP.

## V. GOVERNMENT INSURANCE PROGRAMS.

A. Servicemen's Group Life Insurance (SGLI); 38 U.S.C. §§ 1965-1976; 38 C.F.R. Part 9; Veterans' Benefits Act of 1992, § 201. Office of SGLI (OSGLI), phone number: 1-800-419-1473.

1. Group term life insurance for members of the armed forces, purchased by the government from private insurers, and partially subsidized by the government.
2. Active Component.
  - a. Active duty soldiers are automatically insured for \$250,000 unless they opt out in writing.
  - b. Soldier can elect lower coverage or no coverage by completing VA Form 29-8286.
  - c. Insurability is guaranteed when first given the opportunity to elect SGLI. Thereafter, soldiers who desire to increase coverage may be subject to insurability determinations.
  - d. Provides protection on active duty and for 120 days following separation. No premiums are required during this additional 120-day period.
  - e. Soldiers may lose entitlement to SGLI based on:
    - (1) Their duty status at time of death (e.g., if death occurs during extended AWOL or while serving term of confinement); or
    - (2) Other miscellaneous factors (e.g., following refusal to serve due to conscientious objector status or following conviction of certain serious crimes). See AR 608-2, paras. 2-5 and 2-7.
  - f. Cause of death, however, is irrelevant to SGLI coverage.

- g. Soldiers may convert to Veterans Group Life Insurance (VGLI) within 120 days of separation. No person may carry a combined amount of SGLI and VGLI in excess of \$250,000 at any one time.
  - h. Amount is included in decedent's estate for purposes of federal estate tax, but generally exempt from the claims of creditors and other taxes, including federal income tax.
  - i. No loan, cash, paid-up, or extended insurance value.
- 3. Reserve Component.
  - a. Certain reservists are eligible for full-time coverage.
    - (1) Unit soldiers of the ARNG and USAR and –
      - (a) Unit soldier in pay status.
      - (b) Delayed entry soldiers.
    - (2) IRR or IMA soldiers attached for training in a non-pay status to units that are scheduled for at least 12 periods of IDT annually.
    - (3) Reservists who have completed 20 years of creditable service, but have not begun receiving retired pay.
  - b. Part-time coverage is also available during periods of AT and ADT.
- 4. Eligible beneficiaries.
  - a. Any person designated by the soldier on appropriate VA form (Active Component: VA Form 29-8286). SGLI Act gives service member absolute right to choose beneficiary.

b. If no designation, or "By Law" designation, then proceeds paid according to SGLI statute:

- (1) All to spouse, but if none, then
- (2) All to surviving children in equal shares (and descendants of deceased children, by representation), but if none, then
- (3) All to parents (equally divided), but if none, then
- (4) All to executor of soldier's estate, but if none, then
- (5) Next of kin under state law.

c. Importance of proper designation.

- (1) Avoid "By-Law" designation. "By Law" designations are no longer authorized within the Army. Message, Total Army Personnel Command, TAPC-PEC, subject: Servicemen's Group Life Insurance (SGLI) Program Change (021131Z Mar 93).
- (2) But ensure soldier keeps designation current!
- (3) Consider trustee (living or testamentary) or custodian under Uniform Gifts (Transfers) to Minors Act (UGMA/UTMA) as designated beneficiary for minor children. Such designation may avoid delay and expense in the payment of proceeds.

5. Settlement options.
  - a. Accelerated Death Benefits under SGLI/VGLI for servicemembers in terminal condition (within nine months of death). See Appendix H.
  - b. Soldier may elect lump sum or 36 monthly installments. (On Form SGLV 8286).
  - c. If no election, beneficiary may elect type of settlement.
  - d. Alliance Account & financial services.
6. Apply for benefits by submitting VA Form 29-8283, Claim for Death Benefits, to OSGLI, 212 Washington Street, Newark, N.J. 07102-2999.

B. Veterans Group Life Insurance (VGLI) (38 U.S.C. §§ 1977-1979).

1. Renewable group term life insurance available after soldier leaves active duty. VGLI is five-year renewable term insurance.
2. Up to \$250,000 in coverage available.
3. Active Component soldiers should apply for VGLI within 120 days of leaving the service.
4. Reservists are also eligible when:
  - a. Being released from AD, ADSW, or ADT under call or order specifying not less than 31 days; and
  - b. Members of the IRR and ING.
5. VGLI rates (see Appendix C).
6. Certain reservists may also be eligible.



C. Servicemembers' Group Life Insurance Family Coverage: The Veteran's Opportunity Act of 2001, enacted 5 June 2001, amended Title 38 United States Code, Sections 1965-1970, extending SGLI coverage to insurable dependents.

1. Eligibility: All insurable dependents of active duty and Ready Reserve members covered by SGLI are automatically covered beginning 1 November 2001.
  - a. Insurable dependents include a spouse and all unmarried dependent children under the age of 18, and those over 18 but younger than 23 who attend an accredited school.
  - b. The definition of "child" includes legitimate children, adopted children, illegitimate children of female members, illegitimate children of male members if acknowledged in writing by the military member or judicially recognized, and stepchildren living in the home of the military member.
2. Spousal Coverage:
  - a. A spouse is automatically eligible for \$100,000 of coverage (or to the same level as the military member's SGLI coverage if less than \$100,000).
  - b. A military member elects not to cover the spouse at all or to reduce the \$100,000 coverage in increments of \$10,000 on form SGLV 8286A (Family Coverage Election). The military member pays a premium (by automatic military pay deduction) for spousal coverage.
  - c. The premiums for spousal coverage are:

Spouse's age:	Monthly rate per \$10,000	Monthly cost for \$100,000 coverage
Under 35	\$.90	\$9.00
35-44	\$1.30	\$13.00
45-49	\$2.00	\$20.00
50-54	\$3.20	\$32.00
55 & older	\$5.50	\$55.00

- d. A spousal policy terminates 120 days after:

- (1) The military member elects, in writing, to terminate spouse coverage.
    - (2) The military member's SGLI coverage terminates.
    - (3) The military member dies.
    - (4) The military member and spouse divorce.
    - (5) The spouse can convert the spousal SGLI policy into a commercial policy within 120 days of termination. The Office of Servicemember's Group Life Insurance (OSGLI) will provide a list of participating commercial companies upon request. The spouse cannot convert the SGLI to Veteran's Group Life Insurance (VGLI).
  - e. The military member is the beneficiary of the spousal SGLI policy.
  - f. The spouse has no incidents of ownership over the policy.
  - g. The spouse cannot change the beneficiary, name the beneficiary or contingent beneficiary, nor revoke the policy.
  - h. If a spouse dies and before OSGLI pays the proceeds to the military member the military member also dies, then the spousal SGLI proceeds are paid in accordance with the military member's SGLI policy beneficiary designation.
  - i. If a military member elects not to cover the spouse and later wants to provide spousal coverage, the member must complete for SGLV 8285A (Request for Family Coverage).
3. Child Coverage.
- a. Every dependent child of the military member is automatically covered by a \$10,000 policy.

- b. There is no premium charged for a child's policy.
- c. The military member cannot decline nor reduce the child policy.
- d. Coverage for a child terminates 120 days after:
  - (1) The military member's SGLI coverage terminates.
  - (2) The military member separates from service.
  - (3) The military member dies.
  - (4) The child no longer qualifies for dependent status.
- e. A child policy cannot be converted to a commercial policy at anytime.
- f. The military member is the beneficiary of the child's policy.
- g. If the child dies and before OSGLI can pay the proceeds to the military member the military member also dies, the child's policy proceeds are paid in accordance with the military member's SGLI policy beneficiary designation.
- h. A child of a dual military couple is only covered by one policy. In the event of the child's death, the proceeds of the child's policy are paid to the military member eligible for SGLI coverage the longest. If a dual military couple divorces, the proceeds of a deceased child's policy are paid to the member with custody of the child.

**VI. DEPENDENTS EDUCATIONAL ASSISTANCE (DEA) (38 U.S.C. §§ 3500-3566; 38 C.F.R. PART 21).**

- A. Death of member must be under same circumstances that qualify dependents for receipt of DIC. Additionally, dependents of a totally disabled, but living, veteran may qualify.
- B. School must be approved for Department of Veterans Affairs (DVA) benefits (see 38 U.S.C. § 3523 and § 3672; 38 C.F.R. § 21.7120).
  - 1. Each state establishes an agency that certifies educational programs according to standards established by the DVA.
  - 2. Generally, the DVA will not allow approval of courses that are primarily a vocational or recreational in nature. The statute and regulation contain a list of specific courses which are either prohibited or discouraged.
- C. Eligible Recipients.
  - 1. Surviving spouses.
    - a. Period of eligibility for a spouse extends to 10 years from the date of the veteran's death; extension is possible.
    - b. Will not be reduced by DIC payments.
    - c. Remarriage permanently terminates DEA payments.

2. Children.

- a. Eligibility for child ends at age 26 (unless extended under certain conditions such as the child serving on active duty with the Armed Forces).
- b. Children must elect between DEA and DIC. Election of educational benefits is irrevocable and DIC may not be received once educational benefits begin. (Can receive DIC until age 23 and educational benefits to age 26)
- c. Marriage does not bar payments.

D. Amounts Available (38 U.S.C. § 3532).

- 1. The DVA will pay the eligible recipient \$485 per month if the schooling is full time. Lesser amounts are available for part-time schooling (\$365) and half-time (\$242).
- 2. Total of payments cannot exceed \$3,636 per school year.
- 3. Payments made for a maximum of 45 school months (or to the equivalent thereof in part-time training).

E. State Programs.

## **VII. SOCIAL SECURITY BENEFITS.**

### **A. General Types of Benefits.**

### **B. Eligibility.** For an individual (or his/her survivors) to qualify for social security benefits, the individual will have to be either fully insured or currently insured, or both, depending on the benefit (but see para. C.2.d. below).

1. An individual is fully insured upon receipt of 40 quarters of social security work credits. If an individual dies before age 62, he/she may be considered as "fully insured" with less than 40 credits. The actual number of credits needed depends on age at time of death.
2. An individual is currently insured if the individual has at least six quarterly work credits in the past 13 quarters.
3. Generally, one social security work credit is awarded for each \$600 of wages upon which FICA taxes are paid. A maximum of four credits can be earned in a year (hence, "quarterly credits").

### **C. Available Benefits for Survivors.**

1. Lump sum death benefit of \$255 (deceased must have been either fully or currently insured at time of death).
2. Monthly survivor benefit payments.
  - a. Children under age 18 (deceased fully or currently insured).
  - b. Widow(er) with children under 16 (deceased fully or currently insured).
  - c. Widower age 60 and over (deceased must have been fully insured at time of death).

- d. If the death was service-connected, but the soldier was not either fully or currently insured, the VA will make up any of these social security payments for which the soldier's survivors do not qualify (38 U.S.C. § 1312(a)).
  - e. Amount of monthly benefits depends on work history of insured and family situation. Generally, the more social security (FICA) taxes paid by the insured, the greater the benefits available to the survivors. When calculating the amount of FICA taxes paid by an active duty soldier, most soldiers will qualify for an additional \$1,200 annual credit above the actual amount of FICA taxes paid.
- 3. Social Security benefits may be reduced if surviving spouse has earned income.
- 4. Apply for benefits by submitting SS Form DA-C24 (Application for Survivor Benefits), which can be obtained from the Social Security Administration, to the Social Security Office in your area.
- 5. More specific information on social security entitlements can be obtained by calling 1-800-772-1213.

## **VIII. OTHER PAYMENTS AND BENEFITS TO SURVIVORS OF DECEASED MEMBERS.**

### **A. Death Gratuity (10 U.S.C. § 1475).**

#### **1. Conditions of payment.**

- a. Soldier died on active duty, or
- b. 120 days after release if death resulted from disease or injury incurred while on active duty.

#### **2. Amount.**

- a. Lump sum payment of \$6,000 made by the local finance office.
- b. The lump sum payment amount does not depend on the rank or years of service of the deceased. (National Defense Authorization Act for FY 1993).

#### **3. Beneficiaries.**

- a. By law, to surviving spouse.
- b. If no surviving spouse, to children equally without regard to age or marital status.
- c. If no spouse or children, by designation among parents, brothers, and sisters. DD Form 93.
- d. If no spouse or children and no designation - then to parents (if any survive), otherwise to brothers and sisters. If there are no parents, brothers, or sisters, the death gratuity is not payable (to the estate or otherwise).



4. Tax consequences (I.R.C. § 101(b)(1)).
  - a. If payment is for death occurring on or before 20 August 1996, a total of \$5,000 is excluded from the gross income of the recipients. Remaining \$1,000 is included in gross income. If gratuity is divided between more than one recipient, tax liability is split pro rata.
  - b. If payment is made for a death occurring after 20 August 1996, \$3,000 is excluded from gross income and \$3,000 is taxable. (Pub. L. No. 104-188, 110 Stat. 1755; and I.R.C. § 134).
    - (1) Reduced exclusion is based on the repeal of I.R.C. § 101(b) on 20 Aug 1996. This section excluded \$5,000 of death gratuity from income.
    - (2) Upon the repeal of I.R.C. § 101(b), the excludable portion of the death gratuity reverted to the excludable amount that existed in 1986, when tax free military benefits were consolidated in I.R.C. § 134 which was \$3,000. (See Conference Report to I.R.C. § 134 incorporating 10 U.S.C. §§ 1475-1480 and the 1991 Amendments to 10 U.S.C. § 1478).
5. Apply by submitting DD Form 397, Claim Certification and Voucher for Death Gratuity Payments, to local finance office.

B. Unpaid Pay and Allowances. 37 U.S.C. § 501; Chap. 5, para. 40511, DOD Military Pay and Allowances Manual.

1. Amount.
  - a. All pay due soldier at death, including allowances.
  - b. Accrued leave, which can even exceed 60 days.
2. Beneficiaries.

- a. Designated by soldier.
  - b. If no designation, to spouse, children, parents, or the estate (in that order).
- C. Burial Benefits (10 U.S.C. § 1482; 38 U.S.C. §§ 2301-08 & 2402; 38 C.F.R. § 3.1600).
  - 1. Burial in a national cemetery.
    - a. The following individuals are eligible for burial in a national cemetery:
      - (1) All active duty personnel;
      - (2) Veterans who served a minimum period of time on active duty (generally, 2 years) and were discharged with an other than dishonorable characterization; and
      - (3) Reservists who die on active duty, or die as a result of service-connected injuries, or die after completing 20 good years toward retirement. See Pub. L. No. 103-240.
    - b. Burial in a national cemetery is on a space available basis. Eligibility creates the rights to:
      - (1) A headstone (monetary reimbursement no longer available), and
      - (2) A graveliner (if actually buried in a national cemetery).

2. Additional assistance with burials.
  - a. All active duty soldiers. The next of kin are eligible for the following support:
    - (1) A primary burial allowance. Survivors are authorized reimbursement up to \$1,750 to cover the expenses of recovery, preparation, casketing, and transportation of the body. At the request of the next of kin, however, the Army will assume responsibility for the recovery, preparation, casketing, and transportation of the body in lieu of the primary burial allowance.
    - (2) An internment allowance. The family may request reimbursement for additional funeral expenses, including funeral services and costs of purchase of a plot. The maximum amount of reimbursement ranges from \$110 to \$3,100 depending on whether the soldier is buried in a private cemetery or a national cemetery and whether a funeral home service is used.
    - (3) Reimbursement for next of kin travel to the burial site.
  - b. Certain veterans. The next of kin are entitled to:
    - (1) A burial allowance not to exceed \$1,500 if death is service-connected.
    - (2) An allowance not to exceed \$300 for preparation and transportation of remains and other funeral and burial expenses if death is not service-connected, but veteran was eligible for VA pension or compensation (i.e., the veteran was rated partially or totally disabled). An additional \$150 plot or internment allowance is available to these next of kin if burial is in a private cemetery.
3. Military funeral honors have become a statutory benefit to all veterans effective 01 Jan 2000 pursuant to the National Defense Authorization Act of 2000. See Appendix I.

D. Other Military Benefits (see DA Pam 608-4).

1. Travel of dependents and shipment of household goods and personal effects. 37 U.S.C. § 406(f).
2. Temporary continuation of allowance for dependents of members dying on active duty to continue to occupy family housing for 180 without charge. If dependents not in family housing basic allowance for housing at the rate that is payable for members of the same grade and dependency status as the deceased member for the area where the dependents are residing for 180 days. If in family housing and vacate before 180 days, then the dependents can receive basic allowance for housing for the remainder of the 180 days. 37 U.S.C. § 403.
3. Emergency financial assistance (Army Emergency Relief and/or American Red Cross).
4. Continued service benefits and privileges for dependents of soldier dying on active duty.
  - a. Commissary.
  - b. Post Exchange.
  - c. Medical care.
  - d. Legal assistance.
  - e. VA Death Pension (38 U.S.C. § 5112(b)(4); 38 C.F.R. § 3.660(d); and DA Pam 360-526, p. 16). This benefit is designed for surviving spouses and children of wartime veterans (i.e., those who served at least 90 days during designated war periods) whose survivors have limited income. Service during Desert Storm qualifies. Property holdings and date of marriage to the veteran also affect eligibility. Death need not be service-connected.

## **IX. TERMINAL CONDITION: IS MEDICAL RETIREMENT APPROPRIATE?**

### **A. Factors favoring retirement.**

1. Availability of Survivor Benefit Plan.
  - a. DIC Offset?
  - b. Child only SBP?
2. Higher retirement pay?
3. Availability of Service Disabled Veteran's Life Insurance (38 U.S.C. § 1922; 38 C.F.R. § 8.116).
  - a. \$20,000 of life insurance available to disabled retirees who are otherwise uninsurable.
  - b. Must be applied for by retiree within one year of retirement.
  - c. If retiree is mentally competent at any time between injury and death, the retiree must sign the insurance application (VA Form 29-4364). If serviceman is mentally incompetent for the entire period prior to death, the insurance may be applied for retroactively after the death of the retiree.

### **B. Factors favoring continued active duty.**

1. Is family at risk for extensive medical costs?
  - a. How long might soldier continue to live?
  - b. If retired, when will soldier be removed from military medical care?

c. If retired, will care be available in a VA facility?

2. Eligibility for the Death Gratuity expires if death occurs more than 120 days after retirement.
3. Some commercial life insurance policies issued by companies which deal with the military provide for automatic termination or reduction of coverage upon retirement. Does the soldier have such a policy?
4. Survivors may have to pick up some additional burial expenses if soldier is retired vice remaining on active duty.

C. Summary Comparison on Selected Benefits in imminent death processing (See Information Paper at Appendix G)

<b>Benefit</b>	<b>Death on Active Duty</b>	<b>Death in Retired Status</b>
Serviceman's Group Life Insurance (SGLI)	<b>YES</b>	<b>Yes.</b> Coverage retained for up to one year or until less than totally disabled.
Death gratuity	<b>YES</b>	<b>Yes,</b> if death occurs within 120 days from service-connected disability.
DVA Dependency and Indemnity Compensation (DIC)	<b>YES</b>	<b>YES</b>
Survivor Benefit Plan (SBP) Offset by DIC, but may be more than DIC.	<b>Only</b> if soldier has 20 years of active federal service. Election options restricted by law.	<b>Yes</b> without regard to years of service. Several election options, to include insurable interest for single soldier.
Supplemental SBP Increases basic SBP after age 62 reduction.	<b>NO</b>	<b>YES</b>  (Only for spouse or spouse/child elections.)
Eligibility for DVA Service Disabled Veterans Life Insurance (SDVI)	<b>NO</b>	<b>YES</b>

**X. CONCLUSION.**

**APPENDIX A**  
**SBP FOR RESERVISTS**

**FORMULAS FOR RESERVISTS**

- A. Under Option A, where the member first elects to participate at age 60, the active duty method of calculating costs and benefits applies. If the reservist dies prior to reaching age 60, he is not covered by SBP.
- B. Under Option B, coverage is in effect immediately, but the beneficiary does not receive the SBP annuity until the date the service member would have reached age 60.
- C. Under Option C, coverage is in effect immediately. The beneficiary begins receiving SPB benefits immediately upon the reservist's death.
- D. Cost of electing any coverage before age 60 (Options B and C) is shared by the retiree (through increased premiums) and the beneficiary (through decreased benefits). The cost is based on a complicated calculation involving:
  - 1. The option elected;
  - 2. Retiree's age at election;
  - 3. Difference in age of retiree and beneficiary at election; and
  - 4. Actuarial tables.
- E. Under all three options, no SBP premiums are actually paid until the reservist reaches age 60 and begins to draw retirement pay.

### **COST OF RETIREE SBP**

Example of Reserve retiree who elects spouse only coverage in 1998 and is 55 years old and whose spouse is 52. Option A is no coverage at all until age 60. Option B coverage is in effect prior to age 60, but beneficiary does not receive any payments until service member would have been age 60. Option C is immediate coverage.

	<u>Base Amt.</u>	<u>Cost</u>	<u>Benefit</u>
A	\$1,000	65.00	550.00
B	\$1,000	81.20 <sup>1</sup>	541.09 <sup>2</sup>
C	\$1,000	85.10 <sup>3</sup>	538.94 <sup>4</sup>

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<sup>1</sup>  $(.065 + .0162) * \$1,000 = \$81.20.$

<sup>2</sup>  $[\$1,000 - (.0162 * \$1,000)] * .55 = \$541.09.$

<sup>3</sup>  $(.065 + .0201) * \$1,000 = \$85.10.$

<sup>4</sup>  $[\$1000 - (.0201 * \$1,000)] * .55 = 538.94$



## RESERVE PART OF RCSBP RATES

**METHOD: TWO-TIER**

**TYPE: DEFERRED TO MEMBER'S AGE 60 ("OPTION B")**

**OPTION: SPOUSE ONLY OR SPOUSE/CHILD**

Age at Year of Election	Years Beneficiary Younger Than Member			Years Beneficiary Older Than Member		
	10-14	05-09	00-04	01-04	05-09	10-14
59.5	.0022	.0022	.0020	.0017	.0017	.0016
59	.0044	.0043	.0039	.0034	.0033	.0032
58	.0083	.0082	.0075	.0065	.0063	.0061
57	.0118	.0117	.0107	.0094	.0091	.0088
56	.0148	.0148	.0136	.0119	.0115	.0112
55	.0175	.0175	.0162	.0142	.0138	.0134
54	.0198	.0199	.0185	.0163	.0158	.0153
53	.0218	.0220	.0205	.0181	.0176	.0171
52	.0235	.0238	.0223	.0198	.0192	.0186
51	.0250	.0254	.0239	.0212	.0206	.0200
50	.0262	.0268	.0253	.0225	.0219	.0213
49	.0273	.0279	.0265	.0236	.0230	.0224
48	.0282	.0289	.0275	.0246	.0240	.0233
47	.0290	.0298	.0284	.0255	.0249	.0242
46	.0296	.0305	.0292	.0262	.0256	.0249
45	.0302	.0311	.0298	.0269	.0263	.0256
44	.0306	.0317	.0304	.0274	.0269	.0262

## RESERVE PART OF RCSBP RATES

**METHOD: TWO-TIER**

**TYPE: IMMEDIATE AT MEMBER'S DEATH ("OPTION C")**

**OPTION: SPOUSE ONLY OR SPOUSE/CHILD**

Age at Year of Election	Years Beneficiary Younger Than Member			Years Beneficiary Older Than Member		
	10-14	05-09	00-04	01-04	05-09	10-14
59.5	.0022	.0022	.0020	.0017	.0017	.0016
59	.0049	.0048	.0043	.0038	.0037	.0036
58	.0094	.0093	.0085	.0076	.0072	.0071
57	.0136	.0135	.0126	.0113	.0106	.0104
56	.0174	.0175	.0164	.0148	.0138	.0137
55	.0209	.0212	.0201	.0183	.0169	.0168
54	.0242	.0246	.0235	.0216	.0198	.0198
53	.0271	.0277	.0267	.0247	.0227	.0226
52	.0297	.0306	.0297	.0276	.0254	.0252
51	.0321	.0332	.0324	.0304	.0280	.0277
50	.0343	.0355	.0349	.0329	.0305	.0300
49	.0362	.0376	.0372	.0353	.0329	.0323
48	.0379	.0395	.0393	.0375	.0351	.0344
47	.0395	.0413	.0412	.0395	.0371	.0364
46	.0408	.0428	.0428	.0413	.0390	.0383
45	.0420	.0441	.0444	.0429	.0408	.0400
44	.0430	.0453	.0457	.0444	.0424	.0417

## **APPENDIX B**

### **BENEFICIARY CHECKLIST**

The following steps should be taken by the survivor of a deceased soldier or veteran. See also DA Pam 608-4.

1. Contact all insurance companies. They will require:
  - a. Policy Numbers, and/or;
  - b. Full name of the decedent.
2. Request approximately 10 certified copies of the Death Certificate.
3. Contact the Department of Veterans Affairs for burial payment. They will require:
  - a. Full name of the deceased.
  - b. Social Security Number and Branch of Service.
4. Contact the Department of Veterans Affairs for possible benefits for next of kin if soldier died while on active military duty. They will require:
  - a. Certified copy of the Death Certificate.
  - b. Copy of Marriage Certificate.
  - c. Copies of the Birth Certificates of all dependent children.
5. If soldier retired from military service after September 21, 1972, contact respective branch of service for Survivors Benefit Plan (SBP). They will require:
  - a. Full name of the deceased.
  - b. Social Security Number.
6. Contact soldier's respective branch of service for Retired Serviceman's Family Protection Plan (RSFPP). They will require:
  - a. Full name of the deceased.
  - b. Social Security Number.

7. Contact nearest Social Security Office. They will require:
  - a. Certified copy of Death Certificate.
  - b. Social Security Number of deceased.
  - c. Social Security Numbers for spouse and dependent children.
  - d. Birth Certificates for spouse and dependent children.
  - e. Approximate earnings of deceased in the year of his death and present employer's name.
8. Contact veteran's present employer for possible insurance.
9. Contact your veteran's present employer for funds possibly due from Credit Union participation.
10. Contact Bank for possible mortgage insurance.
11. Notify all creditors of death; there may be Credit Life Insurance on installment loans.
12. Contact any fraternal organization to which the deceased may have belonged for possible life insurance.
13. Contact Civil Service if deceased was employed for more than 18 months in Civil Service.
14. Search for a Will. It may explain how the deceased wanted to disburse the funds and to determine if there are trust funds in existence.
15. Look for check stubs or any canceled checks for payments to an insurance company. Check for securities, real estate, and a safe deposit box.
16. Check for past enrollment in the Veteran's Education Assistance Program and/or payroll purchase plan for Savings Bonds.
17. If death occurred on a common carrier, survivors may be able to collect damages from the carrier (for fault or negligence) and/or insurance proceeds from the relevant travel agent/credit card issuer (no fault or negligence required).
18. If death occurred due to combat, there may be federal tax breaks, both on income tax (I.R.C. § 1692) and estate tax (I.R.C. § 2201).
19. Contact the DVA for information on possible state benefits, including bonuses, educational assistance, employment preferences, and tax exemptions.

**APPENDIX C**  
**VGLI RATES<sup>\*</sup> (Extract)**

Coverage Amount	Age 40-44		Age 45-49		Age 50-54	
	Monthly	Annual	Monthly	Annual	Monthly	Annual
\$250,000	\$60.00	\$660.00	\$105.00	\$1,155.00	\$162.00	\$1,782.00
\$200,000	\$48.00	\$528.00	\$84.00	\$924.00	\$130.00	\$1,430.00
\$100,000	\$24.00	\$264.00	\$42.00	\$462.00	\$ 65.00	\$ 715.00
\$ 10,000	\$ 2.40	\$ 26.40	\$ 4.20	\$ 46.20	\$ 6.50	\$ 71.50

Coverage Amount	Age 55-59		Age 60-64		Age 65-69	
	Monthly	Annual	Monthly	Annual	Monthly	Annual
\$250,000	\$220.00	\$2,420.00	\$281.25	\$3,093.75	\$375.00	\$4,125.00
\$200,000	\$176.00	\$1,936.00	\$225.00	\$2,475.00	\$300.00	\$3,300.00
\$100,000	\$ 88.00	\$ 968.00	\$112.50	\$1,237.50	\$150.00	\$1,650.00
\$ 10,000	\$ 8.80	\$ 96.80	\$ 11.25	\$ 123.75	\$ 15.00	\$ 165.00

\* Your age should be either your age on your 121st day after separation or your age on the date of application, whichever is later. Premium schedule is subject to change.

NOTE: If you pay annually, you can take advantage of a one-month discount, which is reflected in the annual premium shown above.

## APPENDIX D - RECOMMENDED SGLI LANGUAGE

SGLI intended for minors may be designated by the soldier for placement in a trust; for placement in a custodianship under the Uniform Gifts or Uniform Transfers to Minors Act; or for outright gift (in which case a court must appoint a guardian or conservator to receive and maintain the proceeds). The following language is recommended for trust/custodianship SGLI beneficiary designations on the SGLV-8286 (Servicemen's Group Life Insurance Election and Certificate) (see AR 600-8-1, figures 11-12 to 11-14):

- \* Testamentary Trust for Children:<sup>1</sup> **"My trustee to fund a trust established for the benefit of my children<sup>2</sup> under my will."**
- \* Living Trust for Children:<sup>3</sup> **"(Name of trustee), my trustee, pursuant to a trust agreement dated (date)."**
- \* Custodianship under the Uniform Gifts or Uniform Transfers to Minors Act:<sup>4</sup> **"(Name of custodian), as custodian for each of my children,<sup>5</sup> pursuant to the UGMA/UTMA of the state of (name of state), (with distribution to each minor when that minor reaches age (desired age))."**

---

<sup>1</sup> The soldier's will must contain a trust.

<sup>2</sup> The definition of "children" in the SGLI statute excludes stepchildren and certain illegitimate children. If any such children are intended beneficiaries, they should probably be included by name in the SGLI designation. For example, "... for the benefit of my children, including my stepchild, Mary Lamb, ...."

<sup>3</sup> The soldier must create a living trust prior to completing the SGLI form. A copy of the trust agreement should be provided to the SGLI office.

<sup>4</sup> Life insurance custodianships are recognized in every state. A separate custodianship will be established for each child. Either the soldier, the children, the custodian, or OSGLI should have some connection with the state named by the soldier. The age of distribution to the child in most jurisdictions is 18, although in CO, CT, IN, IA, MA, and TN the age of distribution is 21. In CA and NV (and only in these jurisdictions), the soldier may designate any age between 18 and 25 as the age of distribution.

<sup>5</sup> See discussion, supra, note 2.

## APPENDIX E

### EXAMPLES OF COST VS. BENEFIT OF SBP

#### SBP-LTC

<b>YOUR AGE</b>	<b>ANNUAL COST</b>	<b>TOTAL COST</b>	<b>ANNUAL PAYMENT</b>	<b>YEAR INSURANCE</b>	<b>TOTAL PREMIUMS</b>
<b>42</b>	<b>\$1,431</b>	<b>\$ 1,464</b>	<b>\$14,290</b>	<b>\$ 336</b>	<b>\$ 344</b>
<b>47</b>	<b>\$1,699</b>	<b>\$ 10,732</b>	<b>\$16,972</b>	<b>\$ 793</b>	<b>\$ 3,712</b>
<b>52</b>	<b>\$2,018</b>	<b>\$ 24,051</b>	<b>\$20,158</b>	<b>\$ 1,512</b>	<b>\$ 11,335</b>
<b>57</b>	<b>\$2,397</b>	<b>\$ 42,774</b>	<b>\$23,941</b>	<b>\$ 2,560</b>	<b>\$ 26,058</b>
<b>62</b>	<b>\$2,847</b>	<b>\$ 68,663</b>	<b>\$28,435</b>	<b>\$ 3,985</b>	<b>\$ 51,310</b>
<b>67</b>	<b>\$3,381</b>	<b>\$104,000</b>	<b>\$21,491</b>	<b>\$ 6,921</b>	<b>\$ 95,520</b>
<b>72</b>	<b>\$4,015</b>	<b>\$151,737</b>	<b>\$25,525</b>	<b>\$11,497</b>	<b>\$173,107</b>
<b>77</b>	<b>\$4,769</b>	<b>\$215,685</b>	<b>\$30,315</b>	<b>\$18,718</b>	<b>\$304,300</b>
<b>82</b>	<b>\$5,664</b>	<b>\$300,749</b>	<b>\$36,005</b>	<b>\$29,367</b>	<b>\$520,817</b>

#### Personal Assumptions:

Retirement Year:	1998
Retirement Age and Sex:	42 Male
Monthly Retired Pay:	\$2,547.30
Age of Spouse:	39

#### Economic Assumptions:

Retired Couple's Tax Rate:	28%	Inflation:	3.5%
Surviving Spouse's Tax Rate:	15%	Interest Rate:	6.5%

#### Additional Information:

Value of Retirement Pay without SBP:	\$673,192
Value of Retirement Pay with SBP:	\$690,928
Percent of Government Subsidy:	30%

## SBP-COL

<b>YOUR AGE</b>	<b>ANNUAL COST</b>	<b>TOTAL COST</b>	<b>ANNUAL PAYMENT</b>	<b>YEAR INSURANCE</b>	<b>TOTAL PREMIUMS</b>
<b>52</b>	<b>\$2,722</b>	<b>\$ 2,785</b>	<b>\$27,187</b>	<b>\$ 2,039</b>	<b>\$ 2,086</b>
<b>57</b>	<b>\$3,232</b>	<b>\$ 20,418</b>	<b>\$32,290</b>	<b>\$ 3,453</b>	<b>\$ 18,550</b>
<b>62</b>	<b>\$3,839</b>	<b>\$ 45,756</b>	<b>\$38,350</b>	<b>\$ 5,374</b>	<b>\$ 48,345</b>
<b>67</b>	<b>\$4,560</b>	<b>\$ 81,377</b>	<b>\$28,985</b>	<b>\$ 9,334</b>	<b>\$102,611</b>
<b>72</b>	<b>\$5,415</b>	<b>\$130,630</b>	<b>\$34,425</b>	<b>\$15,506</b>	<b>\$200,517</b>
<b>77</b>	<b>\$6,432</b>	<b>\$197,858</b>	<b>\$40,886</b>	<b>\$25,245</b>	<b>\$368,991</b>
<b>82</b>	<b>\$7,639</b>	<b>\$288,678</b>	<b>\$48,560</b>	<b>\$39,608</b>	<b>\$650,365</b>

### Personal Assumptions:

Retirement Year:	1998
Retirement Age and Sex:	52 Male
Monthly Retired Pay:	\$4,846.20
Age of Spouse:	49

### Economic Assumptions:

Retired Couple's Tax Rate:	28%	Inflation:	3.5%
Surviving Spouse's Tax Rate:	15%	Interest Rate:	6.5%

### Additional Information:

Value of Retirement Pay without SBP:	\$1,011,879
Value of Retirement Pay with SBP:	\$1,068,330
Percent of Government Subsidy:	49%



## APPENDIX F

### EXAMPLE OF DEATH ON ACTIVE DUTY VS. RETIREE DEATH

#### HYPOTHETICAL CASE - DEATH ON AD 0-4 with spouse and 2 children (7 and 11 years old)

<u>Monthly Payments</u>	<u>Lump Sum Payments</u>
DIC (Spouse) --- \$ 911	SGLI ----- \$250,000
DIC (Child) ---- \$ 229	Death Gratuity - \$ 6,000
DIC (Child) ---- \$ 229	Pay/Allowances - \$ 3,000
<u>Social Security - \$2,150</u>	<u>Social Security -- \$ 255</u>
<b>TOTAL \$3,519</b>	<b>TOTAL \$259,255</b>

0-4 HAD 15 YEARS TIS

#### HYPOTHETICAL CASE - RETIREE DEATH 0-4 with spouse and 2 children (7 and 11 years old)

<u>Monthly Payments</u>	<u>Lump Sum Payments</u>
DIC (Spouse) --- \$ 911	SGLI ----- \$250,000
DIC (Child) ---- \$ 229	Death Gratuity - \$ 6,000
DIC (Child) ---- \$ 229	Pay/Allowances - \$ 3,000
SBP ----- \$1,061	SDVI ----- \$ 20,000
<u>Social Security-- \$2,150</u>	<u>Social Security -- \$ 255</u>
<b>TOTAL \$4,580</b>	<b>TOTAL \$279,255</b>

0-4 HAD 15 YEARS TIS; 75% DISABILITY RETIREMENT  
(Medical Retirement Pay = \$3,586.28)

## EXAMPLE OF DEATH ON ACTIVE DUTY VS. RETIREE DEATH

### HYPOTHETICAL CASE - DEATH ON AD 0-5 with spouse and 2 children (13 and 17 years old)

<u>Monthly Payments</u>	<u>Lump Sum Payments</u>
DIC (Spouse) --- \$ 911	SGLI ----- \$250,000
DIC (Child) ---- \$ 229	Death Gratuity - \$ 6,000
DIC (Child) ---- \$ 229	Pay/Allowances - \$ 3,000
SBP ----- \$ 893	
<u>Social Security-- \$2,150</u>	<u>Social Security -- \$ 255</u>
<b>TOTAL \$4,412</b>	<b>TOTAL \$259,255</b>

0-5 HAD 22 YEARS TIS  
(Regular Retirement Pay = \$3,280.53)

### HYPOTHETICAL CASE - RETIREE DEATH 0-5 with spouse and 2 children (13 and 17 years old)

<u>Monthly Payments</u>	<u>Lump Sum Payments</u>
DIC (Spouse) --- \$ 911	SGLI ----- \$250,000
DIC (Child) ---- \$ 229	Death Gratuity - \$ 6,000
DIC (Child) ---- \$ 229	Pay/Allowances - \$ 3,000
SBP ----- \$1,549	SDVI ----- \$ 20,000
<u>Social Security-- \$2,150</u>	<u>Social Security -- \$ 255</u>
<b>TOTAL \$5,068</b>	<b>TOTAL \$279,255</b>

0-5 HAD 22 YEARS TIS; 75% DISABILITY RETIREMENT  
(Medical Retirement Pay = \$4,473.45)

## **APPENDIX G**

### **INFORMATION PAPER**

TAPD-OEA

10 Feb 2000

SUBJECT: Imminent Death Processing

1. Purpose. To provide an overview of expeditious processing of imminent death cases and the benefits that result when a soldier pending death is expeditiously retired for physical disability.

2. Facts.

a. Expeditious processing of imminent death cases consists of procedures for completing physical disability evaluation and retirement on a 24-hour basis.

b. Imminent death procedures are applied to the cases of Active and Reserve Component soldiers when the Medical Treatment Facility (MTF) determines that the soldier is expected to die within 72 hours from a medical condition incurred or aggravated in the line of duty.

c. No regulatory and statutory requirements are omitted or accomplished after the fact of death. For example, if a line of duty determination is required, retirement is not executed until the required level of determination (informal or formal) per AR 600-8-1, chapter 39 (1986), is approved and confirms an in-line-of-duty finding. Retirement must be executed before death as defined by the laws of the state where the soldier is assigned, or if soldier is outside of the Continental United States, as defined under military medical standards.

d. To protect the interests of the soldier and the government should the soldier recover or improve, the soldier is placed on the Temporary Disability Retired List.

e. The MTF Physical Evaluation Board Liaison officer (PEBLO) and the Installation Retirement Services Officer (RSO) have joint responsibility to counsel the soldier and the soldier's next of kin.

(1) The PEBLO is responsible for counseling the soldier and the soldier's next of kin on the disability evaluation process, the soldier's rights in the process, the Physical Evaluation Board findings, estimated disability compensation, and potential Department of Veterans Affairs (DVA) benefits and programs.

(2) The RSO is responsible for counseling the soldier and the soldier's next of kin on retirement and survivor benefits, to include the Survivor Benefit Plan (SBP), and DVA and Social Security entitlements. The RSO must:

(a) Complete the DD Form 2656 (Data for Payment of Retired Personnel), which indicates the family's desired SBP election; and

(b) Coordinate with HQDA, Army Retirement Services--the Secretary of the Army designee to make SBP elections on behalf of death imminent soldiers.

(3) The Army and Air Force Mutual Aid Association is available to assist the PEBLO or RSO by producing a benefits comparison tailored to the soldier's circumstances. The Association will telefax or email the comparison to the PEBLO and RSO without regard to whether the soldier is a member of the Association. The questionnaire at enclosure 1 must be provided to the Association. The printout is generally available only during the Association's office hours: 0830 to 1630, Eastern Standard Time. The objective of the Association is to be of service to the soldier and his family by providing the maximum information available on benefits. However, as a private institution not under contract to Department of Defense, the Association cannot assume liability for the choices made.

f. Due to the variables that affect benefits, primarily under SBP, this information paper cannot provide an exact monetary comparison of benefits between death on active duty and death in retired status. These variables include: The age of the spouse; whether there are children; the ages of the children and whether any are handicapped; whether a wife is pregnant at time of the soldier's death; specifics of any divorce settlement regarding former spouse entitlement to SBP; effect of remarriage on benefit entitlement; and, whether a single soldier has a relative that would qualify as an insurable interest beneficiary.

g. In most cases when death is imminent, retirement for physical disability provides greater benefits than if death occurs on active duty due to the benefits described below. A summary matrix is attached.

(1) Entitlement to the same active duty death benefits.

(a) Soldiers retired under imminent death procedures are totally disabled soldiers. Totally disabled soldiers retain coverage under Servicemen's Group Life Insurance (SGLI) up to one year or until the disability ceases to be total in degree, whichever occurs first, with no premium cost during this period.

(b) The death gratuity is payable to certain survivors if the death occurs within 120 days following retirement and is related to service connected causes as determined by the DVA.

(2) Eligibility for DIC and SBP.

(a) Eligible survivors of soldiers who die on active duty are entitled to DVA Dependency and Indemnity Compensation (DIC). They are not entitled to SBP unless the soldier had at least 20 years of federal service. In that case the law directs a “spouse only” election for a married soldier or a “child(ren) only” election for an unmarried soldier with child(ren). No other options are available.

(b) Survivors of retired soldiers who die of a service-connected disability may be entitled to DIC. The DVA should be consulted to ensure eligibility based on the DVA’s marriage requirements and in-line-of-duty considerations.

(c) Soldiers pending disability retirement are eligible to elect SBP and have several election options: Spouse only, children only, spouse and children, former spouse only, former spouse and children; insurable interest; and, no election.

(d) There is a dollar for dollar offset between DIC and SBP for SBP elections of spouse only or spouse and child. However, depending on the retired pay entitlement, SBP may exceed the DIC amount, in which case monies would be payable from both VA and DoD. DIC has no offsetting impact on a child’s SBP receipt. Thus, the flexibility of options available to the soldier pending retirement allows for weighing long term versus short term benefits in light of the number of dependents and their ages.

(e) A single soldier with no children or one dependent child has the election option of “natural person with an insurable interest.” An annuity can be provided to any relative more closely related to the soldier than a cousin or a close business associate with proof of being financially affected by the soldier’s death. This option is not available to single soldiers who die on active duty eligible for retirement.

(f) When a soldier pending retirement is mentally incompetent to make an SBP election, the Secretary of the Army makes the appropriate election on behalf of the soldier. This authority has been delegated to Chief, Army Retirement Services, Office of the Deputy Chief of Staff for Personnel. The RSO coordinates the action.

(3) Eligibility for Supplemental SBP (SSBP). SSBP is the supplemental plan which increases basic SBP’s after-age-62 annuity amount. SSBP is not part of the active-duty death survivor package, even when the member has more than 20 years active federal service. It can only be elected at retirement. It is not connected to DIC; it is payable at age 62 to a qualified surviving spouse in addition to any DIC amounts received.

(4) Possibility of Greater retired pay and greater SBP/SSBP annuity. Retired pay is computed using a multiplier equating to years of service or the disability rating—both limited to 75%. The disability rating for imminent death retirement is 100%. Thus, even a soldier who was eligible to retire for length of service would benefit from death imminent retirement processing because of the higher multiplier used to calculate retired pay as well as the SBP election flexibility afforded by retirement.

(5) Eligibility for Service Disabled Veterans Life Insurance (RH) (SDVI). This is a \$10,000 policy for disabled veterans. A soldier must be retired in order to apply for it.

(a) Totally disabled veterans, may apply for waiver of premiums for the basic policy. After six months, totally disabled veterans may apply for an additional policy of up to \$20,000.

(b) If the veteran is mentally competent, but physically incapable of signing the application, a statement to that effect can be submitted by his doctor or nurse. The statement must confirm that the veteran was totally aware of what was happening and why he couldn't sign. If he is mentally incompetent, only a court appointed guardian can sign the application.

(c) If the mentally incompetent soldier dies before a guardian is appointed, the soldier's beneficiary may apply for gratuitous SDVI ("ARH"). This is a lump sum payment, the approval of which rests with the DVA.

h. There are two considerations which may result in retirement posing a hardship.

(1) Civilian life insurance: Does the soldier have a civilian policy that provides greater benefits if death occurs on active duty? Usually these are policies offered by military oriented associations. The amount of such a policy should be carefully weighed against the overall entitlement package afforded by retirement.

(2) Hospitalization in a civilian facility: If the soldier is in a civilian facility when retired, the spouse becomes responsible for those medical costs not covered under the soldier's TRICARE plan. While this is a factor to consider, a death imminent soldier who survives but needs additional hospital level care may be transferred to a VA hospital, where TRICARE is not an issue. The installation Health Benefits Advisor (HBA) should be consulted on this matter.

Frances A. Dennis(202) 782-3064  
USPDA Policy Officer  
Dennis E. Brower(202)782-3002  
USPDA Legal Advisor  
(DSN 662)

## AAFMAA PEBLO/CAO QUESTIONNAIRE

(No Cover Sheet Required – Page 1 of 1)

AAFMAA  
Ft. Myer, VA 22211  
FAX # (703) 875-0070

CAO/PEBLO Requesting: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Phone: \_\_\_\_\_  
FAX: \_\_\_\_\_

### XI. SERVICE MEMBER DATA

1. NAME: \_\_\_\_\_
2. DATE OF BIRTH: MO \_\_\_\_\_ DAY \_\_\_\_\_ YR \_\_\_\_\_
3. PRESENT RANK/GRADE: \_\_\_\_\_
4. DATE OF DEATH: MO \_\_\_\_\_ DAY \_\_\_\_\_ YR \_\_\_\_\_
5. SSAN: \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_
6. PAY ENTRY BASE DATE (PEBD): MO \_\_\_\_\_ DAY \_\_\_\_\_ YEAR \_\_\_\_\_
7. BASIC ACTIVE SERVICE DATE (BASD): MO \_\_\_\_\_ DAY \_\_\_\_\_ YEAR \_\_\_\_\_
8. PRESENT MARITAL STATUS: SINGLE \_\_\_\_\_ MARRIED \_\_\_\_\_
9. DATE OF PRESENT MARRIAGE: MO \_\_\_\_\_ DAY \_\_\_\_\_ YEAR \_\_\_\_\_

### XII. FAMILY DATA

10. CURRENT SPOUSE NAME: \_\_\_\_\_
11. SPOUSE DOB: MO \_\_\_\_\_ DAY \_\_\_\_\_ YEAR \_\_\_\_\_
12. CHILDREN:
  - #1 \_\_\_\_\_ DOB: MO \_\_\_\_\_ DAY \_\_\_\_\_ YR \_\_\_\_\_
  - #2 \_\_\_\_\_ DOB: MO \_\_\_\_\_ DAY \_\_\_\_\_ YR \_\_\_\_\_
  - #3 \_\_\_\_\_ DOB: MO \_\_\_\_\_ DAY \_\_\_\_\_ YR \_\_\_\_\_
  - #4 \_\_\_\_\_ DOB: MO \_\_\_\_\_ DAY \_\_\_\_\_ YR \_\_\_\_\_
  - #5 \_\_\_\_\_ DOB: MO \_\_\_\_\_ DAY \_\_\_\_\_ YR \_\_\_\_\_
  - #6 \_\_\_\_\_ DOB: MO \_\_\_\_\_ DAY \_\_\_\_\_ YR \_\_\_\_\_

Please complete ALL date fields. Dates are more important than names if names are not readily available.

FOR AAFMA USE: PROCESS DATE: \_\_\_\_\_ INITIALS: \_\_\_\_\_

## APPENDIX H

### INFORMATION PAPER

DAJA-LA  
25 March 1999

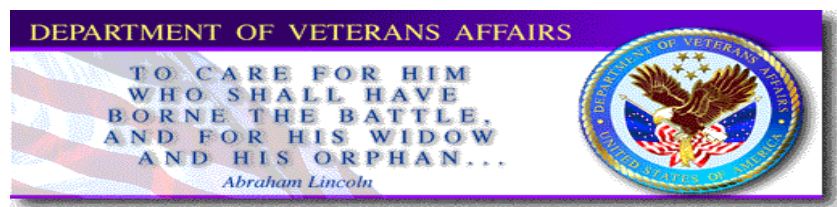
SUBJECT: Accelerated Death Benefit - SGLI

1. PURPOSE: To provide information on obtaining an accelerated death benefit for terminally ill SGLI policy holders.

2. FACTS.

a. The President signed in to law on Veterans Day (November 11) as part of the Veterans Programs Enhancement Act. Implementation date was February 9, 1999. Interim final rule under review.

b. The Department of Veterans Affairs will issue rules soon. Watch VA's web site for more details: <http://www.va.gov>.



c. Holders of Servicemen's Group Life Insurance (SGLI) or Veterans Group Life Insurance (VGLI) who have been diagnosed as terminally ill may receive up to half the face value of their SGLI/VGLI policy as a lump sum - \$5,000 increments up to 50 percent available.

d. To qualify for the accelerated benefit, the policyholder must be diagnosed as having a life expectancy of less than 9 months. The member's subsequent SGLI/VGLI premiums will be reduced to reflect the remaining face value of the policy. The election may not be made more than once, and it will be irrevocable.

e. Not taxable - under the new law, the accelerated death benefit payment "shall not be considered income or resources for purposes of determining eligibility for or the amount of benefits under any Federal or federally-assisted program or for any other purpose."

f. Send proof of policy coverage & medical diagnosis to

Office of Servicemen's Group Life Insurance (OSGLI)  
213 Washington Street  
Newark, NJ 07102-2999  
1-800-419-1473

COL Hancock/703-588-6708



## APPENDIX I

P 170639Z DEC 99

FM CDRPERSCOM ALEXANDRIA VA //TAPC-PED-A//

MILPER MESSAGE NR 00-67

SUBJECT: **MILITARY FUNERAL HONORS**

1. THIS MILPER MESSAGE WILL EXPIRE NO LATER THAN JAN 2002.

2. MILITARY FUNERAL HONORS HAVE BECOME A STATUTORY BENEFIT TO ALL VETERANS EFFECTIVE 1 JANUARY 2000 WITH THE SIGNING OF THE NATIONAL DEFENSE AUTHORIZATION ACT 2000. CASUALTY AREA COMMANDS (CACS) MUST ENSURE THEY ESTABLISH MILITARY FUNERAL HONORS TEAMS TO MEET A SIGNIFICANT INCREASE IN REQUESTS ANTICIPATED FROM FAMILIES FOR FUNERAL HONORS. CACS HAVE THE ULTIMATE RESPONSIBILITY FOR PROVIDING MILITARY FUNERAL HONORS. CACS ARE RESPONSIBLE TO ENSURE PROPER DECORUM FOR MILITARY FUNERAL HONORS INCLUDING APPROPRIATELY TRAINED PERSONNEL AND PROPER EQUIPMENT, STANDARDIZED HONORS PROCEDURES, AND QUALITY CONTROL OF MILITARY FUNERAL HONORS TEAMS CONSISTENT WITH DEPARTMENT OF THE ARMY STANDARDS.

3. OSD HAS DEFINED "VETERANS" (FOR ELIGIBILITY FOR MILITARY FUNERAL HONORS) AS ANY PERSON WHO:

A. SERVED IN THE ACTIVE MILITARY, NAVAL, OR AIR SERVICE (AS DEFINED IN 38 U.S.C. 101(24)) AND WHO WAS DISCHARGED OR RELEASED THEREFROM UNDER CONDITIONS OTHER THAN DISHONORABLE; OR B. WAS A MEMBER OR FORMER MEMBER OF THE SELECTED RESERVE DESCRIBED IN 38 U.S.C. 2301(F)

(1) COMPLETED AT LEAST ONE ENLISTMENT AS A MEMBER OF THE SELECTED RESERVE OR, IN THE CASE OF AN OFFICER, COMPLETED THE INITIAL OBLIGATED SERVICE AS A MEMBER OF THE SELECTED RESERVE; OR

(2) WAS DISCHARGED BEFORE COMPLETION OF THE PERSON'S INITIAL ENLISTMENT AS A MEMBER OF THE SELECTED RESERVE OR, IN THE CASE OF AN OFFICER, PERIOD OF INITIAL OBLIGATED SERVICE AS A MEMBER OF THE SELECTED RESERVE, FOR A DISABILITY INCURRED OR AGGRAVATED IN LINE OF DUTY; OR

(3) DIED WHILE A MEMBER OF THE SELECTED RESERVE.

C. MILITARY BURIAL HONORS MAY NOT BE FURNISHED IN THE CASE OF A PERSON WHOSE LAST DISCHARGE FROM THE SELECTED RESERVE WAS UNDER DISHONORABLE CONDITIONS.

D. IN ACCORDANCE WITH 10 U.S.C. 985, MILITARY BURIAL HONORS MAY NOT BE FURNISHED FOR ANY INDIVIDUAL CONVICTED OF A CAPITAL OFFENSE UNDER FEDERAL OR STATE LAW FOR WHICH THE PERSON WAS SENTENCED TO DEATH OR LIFE WITHOUT PAROLE.

E. MILITARY FUNERAL HONORS FOR VETERANS WHO SERVED IN THE ARMY AIR CORPS OR THE ARMY AIR FORCE WILL BE PROVIDED BY THE U.S. AIR FORCE, UNLESS THE VETERAN'S FAMILY SPECIFICALLY ASKS FOR AN ARMY BURIAL HONORS TEAM.

F. PROOF OF ELIGIBILITY FOR MILITARY BURIAL HONORS CEREMONIAL FOLDING AND PRESENTATION OF THE INTERMENT FLAG AND PLAYING SHOULD BE REQUESTED FROM THE NEXT-OF-KIN.

4. AS OF 1 JANUARY 2000, A TWO-SERVICE MEMBER TEAM TO PERFORM THE OF TAPS IS THE MINIMUM REQUIREMENT FOR ALL VETERAN FUNERALS UPON RECEIPT OF A REQUEST FROM A FAMILY MEMBER OR HIS/HER REPRESENTATIVE. THIS MAY BE A REQUEST FROM A FUNERAL DIRECTOR OR VETERAN SERVICE ORGANIZATION (VSO). ONE OF THE MEMBERS OF THE TEAM MUST BE A MEMBER OF THE DECEASED VETERAN'S SERVICE. THE CHIEF OF STAFF, ARMY IS CURRENTLY REVIEWING THIS POLICY. HE MAY WITHIN THE NEXT SEVERAL MONTHS ENLARGE THE ARMY REQUIREMENT TO PROVIDE A BIGGER DETAIL AND TO EXPAND THE HONORS RENDERED. IN THE MEANTIME, FOR ANY REQUESTED VETERANS' FUNERAL, CACS MUST ENSURE A MINIMUM OF TWO SOLDIERS.

5. PROCEDURES: THE FOLLOWING PROCEDURES WILL BE IMPLEMENTED TO ENSURE COMPLIANCE WITH THE MILITARY FUNERAL HONORS PORTION OF NDAA 2000 (AN ABBREVIATED CHECKLIST IS PROVIDED AT PARAGRAPH 9). PREPARATION FOR FUNERAL HONORS BEGINS WITH THE REQUEST FOR ARMY ASSISTANCE USING THE DOD HOTLINE AS FOLLOWS:

A. REQUESTS FOR MILITARY FUNERAL HONORS WILL BE INITIATED BY THE NEXT-OF-KIN, OR HIS/HER AUTHORIZED REPRESENTATIVE (IN MOST CASES THE FUNERAL DIRECTOR), TO THIS 24 HOUR SYSTEM AT 1-877-MIL-HONR (1-877-645-4667). THE REQUESTOR WILL BE ASKED BY AUTOMATIC DEVICE THE BRANCH OF SERVICE OF THE DECEASED VETERAN AND THE STATE AND COUNTY THAT THE INTERMENT WILL BE MADE. THE REQUESTOR WILL THEN BE AUTOMATICALLY TRANSFERRED TO THE APPROPRIATE CAC FOR SERVICE. DOD HAS DIRECTED THAT ALL REQUESTS FOR MILITARY FUNERAL HONORS MUST BE ANSWERED BY THE CAC WITHIN 12 HOURS FROM WHEN THE REQUEST IS MADE, NOT FROM WHEN THE REQUEST IS RECEIVED. AN ALTERNATIVE IS TO CONTACT A CAC DIRECTLY.

B. ONCE THE ARMY CAC IS ALERTED, IT MUST ARRANGE FOR THE DETAIL TO ARRIVE AT THE INTERMENT SITE AT THE APPROPRIATE TIME IN ORDER TO PROVIDE GRAVESIDE HONORS BY THE PLAYING OF TAPS AND THE FLAG FOLDING AND PRESENTATION TO THE APPROPRIATE FAMILY MEMBER. THE LEADER OF THE DETAIL HAS A NUMBER OF RESPONSIBILITIES. THESE INCLUDE CONTACTING THE FUNERAL DIRECTOR TO CONFIRM THE DATE, TIME AND LOCATION OF THE INTERMENT SERVICE. THE LEADER WILL ENSURE THAT THE FUNERAL DIRECTOR HAS OBTAINED A FLAG AND WILL BRING A BACKUP FLAG TO THE CEREMONY "JUST IN CASE" IT IS NEEDED. THE LEADER WILL CONFIRM AND COORDINATE PARTICIPATION OF THE SECOND MEMBER OF THE DETAIL. ONCE EVERYTHING IS COORDINATED, THE FINAL PREINTERMENT ACTIVITY IS TO TRAIN AND REHEARSE THE DETAIL. A MANDATORY TRAINING ITEM IS TO CAREFULLY WATCH A COPY OF THE VIDEO DEMONSTRATION TAPE PROVIDED BY DOD TO EACH INSTALLATION. ON THE DAY OF THE INTERMENT CEREMONY, THE DETAIL LEADER WILL CONFIRM ARRANGEMENTS WITH THE FUNERAL DIRECTOR. HE/SHE WILL WORK OUT NECESSARY CUES AT THE INTERMENT SITE WITH THE FUNERAL DIRECTOR.

C. THE RENDITION OF TAPS MAY BE BY A BUGLER OR BY DEVICE. THE CAC WILL CONDUCT AN ACTIVE SEARCH FOR A BUGLER. BUGLER SUPPORT MAY BE FROM AN ARMY BAND (ACTIVE OR RESERVE COMPONENT), CONTRACTED, OR VOLUNTARY. IF A BUGLER IS NOT AVAILABLE, THE CAC WILL USE THE HIGH QUALITY RECORDING PROVIDED BY OSD ON COMPACT DISK OF THE U.S. ARMY BAND BUGLER. MANY NATIONAL AND PRIVATE CEMETERIES HAVE SOUND SYSTEMS THAT PLAY TAPS AT THE INTERMENT SITE. HOWEVER, CACS CANNOT ASSUME AVAILABILITY OF SUCH AND MUST POSSESS A SUFFICIENT NUMBER OF HIGH QUALITY PORTABLE CD PLAYERS TO PROVIDE THEIR OWN SOUND SYSTEM AT FUNERALS. RECOMMENDED IS A "BOOM BOX" SYSTEM THAT IS EASILY HEARD BY ALL ATTENDEES AT THE INTERMENT CEREMONY. BEFORE DEPARTING FOR A FUNERAL, THE DETAIL LEADER MUST ASCERTAIN IF A SOUND SYSTEM IS AVAILABLE OR IF THE CAC MUST PROVIDE A SOUND SYSTEM TO THE HONORS DETAIL.

D. THE DETAIL WILL ARRIVE AT THE INTERMENT SITE EARLY AND CONDUCT A RECONNAISSANCE AND REHEARSAL. PART OF THE REHEARSAL SHOULD BE THE SELECTION OF A LOCATION OUT OF SIGHT OF THE MOURNERS FOR THE BUGLER OR CD PLAYER THAT WILL SOUND TAPS. THE DETAIL LEADER WILL SET UP AND TEST THE CD PLAYER, ENSURING THE UNIT AND ITS REMOTE CONTROL ARE WORKING PROPERLY. ONCE EVERYTHING IS PREPARED, THE DETAIL LEADER WILL POSITION THE DETAIL IN THEIR DESIGNATED PLACE PRIOR TO THE ARRIVAL OF THE FUNERAL CORTEGE. THE DETAIL LEADER WILL POSITION HIMSELF NEAR THE RECORDING DEVICE; THE OTHER MEMBER(S) WILL BE POSITIONED NEAR THE FOOT OF THE GRAVE. THE LEADER WILL BRING THE TEAM TO "ATTENTION" AND "PRESENT ARMS" AS THE REMAINS ARE CARRIED TO THE GRAVESITE BY CIVILIAN PALLBEARERS. HE WILL COMMAND "ORDER ARMS" WHEN THE REMAINS HAVE BEEN PLACED ON THE LOWERING DEVICE. AT THE CONCLUSION OF THE COMMITMENT SERVICE, THE DETAIL LEADER WILL SOUND "TAPS" ELECTRONICALLY OR DIRECT THE BUGLER TO SOUND "TAPS". INSTALLATIONS MUST ENSURE THAT TRAINING FOR DETAILS INCLUDES INSTRUCTION ON ENSURING THE RECORDING DEVICE IS POSITIONED OUT OF SIGHT FROM THE FAMILY AND PLAYED IN A DIGNIFIED MANNER AS SHOWN IN THE TRAINING VIDEO FROM DOD. ALTHOUGH THE CD SHOULD BE OUT OF SIGHT, ACTIVATING THE "PLAY" BUTTON SHOULD BE PERFORMED WITH PRECISION AND DISTINCTION BY BENDING OVER, ACTIVATING THE RECORDER AND THEN STEPPING BACK ONE STEP BACK AND ASSUMING THE POSITION OF "ATTENTION". EACH DETAIL MEMBER WILL "PRESENT ARMS" DURING "TAPS" AND "ORDER ARMS" AT ITS COMPLETION. AT THE CONCLUSION OF "TAPS", THE DETAIL LEADER MUST ENSURE THE RECORDING DEVICE IS TURNED OFF; AND THEN PROCEED IN A DIGNIFIED AND MILITARY MANNER TO THE HEAD OF THE CASKET.

E. FOR FLAG FOLDING, UPON CONCLUSION OF "TAPS", THE REPRESENTATIVE AND HIS ASSISTANT WILL MOVE CLOSER TO THE CASKET. ONCE THE FLAG IS SECURED AND RAISED, THE DETAIL WILL TAKE THREE SIDE STEPS AWAY FROM THE MOURNERS. AFTER COMPLETING THE THREE SIDE STEP MOVEMENT, THEY WILL FOLD THE FLAG. WHEN THE FLAG IS PROPERLY FOLDED, THE DETAIL ASSISTANT WILL HAND THE FLAG TO THE DETAIL LEADER AND POST TO A POSITION NEXT TO THE SIDE OR REAR OF THE FAMILY. THE DETAIL LEADER WILL PRESENT THE FLAG TO THE NEXT OF KIN. THE FLAG WILL NOT BE PRESENTED UNTIL THE ASSISTANT DEPARTS. THE LEADER WILL THEN PRESENT THE FLAG TO THE NEXT OF KIN USING THE FOLLOWING WORDING:

"THIS FLAG IS PRESENTED ON BEHALF OF A GRATEFUL NATION AND THE UNITED STATES ARMY AS A TOKEN OF APPRECIATION FOR YOUR LOVED ONE'S HONORABLE AND FAITHFUL SERVICE." AFTER PRESENTING THE FLAG, THE DETAIL LEADER WILL OFFER CONDOLENCES.

F. THERE ARE TWO TYPES OF REMAINS; CASKETED AND CREMATED. EACH HAS ITS OWN SEQUENCE OF EVENTS FOR THE GRAVESIDE SERVICE. THE SEQUENCE DESCRIBED ABOVE IS FOR CASKETED REMAINS. PROCEDURES FOR CREMATED REMAINS ARE DIFFERENT ONLY IN THAT THE FLAG IS CARRIED BEHIND THE URN AND PLACED ON A DISPLAY DEVICE NEXT TO THE URN. AFTER "TAPS" IS SOUNDED, THE FLAG IS UNFOLDED, SECURED AND REFOLDED APPROXIMATELY THREE SIDE STEPS FROM THE MOURNERS. IT IS THEN PRESENTED TO THE NEXT OF KIN IN THE SAME MANNER AS FOR CASKETED REMAINS DESCRIBED ABOVE. THE DETAIL LEADER WILL THEN OFFER CONDOLENCES.

G. THE RESERVE COMPONENTS (RC) ALONG WITH THE ACTIVE ARMY WILL BE REQUIRED TO PARTICIPATE IN THIS SENSITIVE MISSION. THE ARMY NATIONAL GUARD (ARNG) AND U.S. ARMY RESERVE (USAR) WILL HAVE A SINGLE POINT OF CONTACT (POC) IN EACH ARNG STATE AREA COMMAND (STARC) OR USAR REGIONAL SUPPORT COMMAND (RSC) TO WHICH A REQUEST FOR ASSISTANCE CAN BE MADE. WHEN THE ACTIVE ARMY IS UNABLE TO SUPPORT THE REQUEST OR IT IS MORE PRUDENT FOR THE RC UNIT TO PROVIDE HONORS, THE CAC WILL CONTACT THE RC POC AT EITHER THE STARC OR RSC FOR MILITARY FUNERAL HONORS SUPPORT. IF THE RC POC HAS NOT RESPONDED TO THE REQUEST FOR SUPPORT WITHIN TWO HOURS, THE CAC SHOULD AGAIN CONTACT THE RC POC. WHEN THE RC IS UNABLE TO SUPPORT THE REQUEST FOR ASSISTANCE, THE CAC WILL BE RESPONSIBLE FOR PROVIDING THE HONORS. CACS WILL BE PROVIDED A LIST OF RC POCS BY THE CASUALTY AND MEMORIAL AFFAIRS OPERATIONS CENTER, PERSCOM. CACS SHOULD ESTABLISH MEMORANDUMS OF AGREEMENT WITH RC POCS, AND OTHER MILITARY ORGANIZATIONS WITHIN THEIR AREA OF RESPONSIBILITY SPELLING OUT REQUIREMENTS AND RESPONSIBILITIES.

H. VETERAN SERVICE ORGANIZATIONS HAVE INDICATED A WILLINGNESS TO CONTINUE TO ASSIST THE ARMY IN SUPPORTING MILITARY FUNERAL HONORS. CACS WILL MAINTAIN LIAISON WITH THESE ORGANIZATIONS WITHIN THEIR AREA OF RESPONSIBILITY AND ENSURE THAT HONORS PROCEDURES ARE REHEARSED WITH VSO MEMBERS TO ENSURE A PROFESSIONAL CEREMONY IS CONDUCTED.

6. DOD/HQDA ASSISTANCE: IN ORDER TO FACILITATE PERFORMANCE OF THE PROVISIONS OF NDAA 2000, DOD AND HQDA ARE PROVIDING THE FOLLOWING ELEMENTS OF ASSISTANCE:

A. A TOLL FREE TELEPHONE ACCESS SYSTEM HAS BEEN ESTABLISHED. THIS LINE WAS ACTIVATED ON 17 DECEMBER 1999 AND WILL BE OPERATIONAL ON 1 JANUARY 2000.

B. A WEBSITE HAS BEEN ESTABLISHED FOR ACCESS BY FUNERAL DIRECTORS, ACTIVE AND RETIRED SOLDIERS, VETERANS, AND FAMILIES FOR THE PURPOSE OF ASSISTING THEM IN OBTAINING INFORMATION PERTAINING TO FUNERAL HONORS AND A REGISTRY OF THOSE GROUPS AUTHORIZED TO PROVIDE HONORS. THIS INCLUDES THE DOD MILITARY FUNERAL HONORS INFORMATION WEBSITE AT [HTTP://WWW.MILITARYFUNERALHONOR.OSD.MIL](http://www.militaryfuneralhonor.osd.mil). THE WEBSITE CONTAINS INFORMATION ON WHAT CONSTITUTES MILITARY FUNERAL HONORS, ELIGIBILITY FOR MILITARY FUNERAL HONORS, FLAG AND HEADSTONE INFORMATION, AND FREQUENTLY ASKED QUESTIONS. THE WEBSITE WILL BE FULLY OPERATIONAL ON 1 JANUARY 2000.

C. INFORMATIONAL KITS WILL BE DISTRIBUTED TO ALL FUNERAL HOMES TO INFORM AND UPDATE THEM ON MILITARY FUNERAL HONORS PROCEDURES. THESE KITS WILL BE DISTRIBUTED FROM DOD PRIOR TO 1 JANUARY 2000. THE KITS WILL CONTAIN A BROCHURE RELATING TO MILITARY FUNERAL HONORS, A DIRECTORY OF FUNERAL HONORS POCS, FLAG FOLDING PROTOCOL, FREQUENTLY ASKED QUESTIONS REGARDING DEATH BENEFITS, AND A COPY OF THE PORTION OF THE LAW RELATING TO FUNERAL HONORS.

D. THE MILITARY DISTRICT OF WASHINGTON WILL ALSO PRODUCE A VIDEO TRAINING TAPE TO INSTRUCT TEAM MEMBERS ON THE PROPER CUSTOMS AND COURTESIES FOR MILITARY FUNERAL HONORS INCLUDING HOW TO PROPERLY FOLD THE FLAG. THESE TRAINING TAPES WILL BE DISTRIBUTED BY DOD TO ALL ACTIVE AND RESERVE COMPONENT UNITS. LOCAL REPRODUCTION IS AUTHORIZED AND ENCOURAGED, PROVIDED THE QUALITY IS NOT DEGRADED. THE MDW WILL ALSO PROVIDE ON SITE TRAINING UPON REQUEST AND AT CAC EXPENSE. REQUESTS SHOULD BE COORDINATED THROUGH THE CASUALTY AND MEMORIAL AFFAIRS OPERATIONS CENTER, PERSCOM.

E. DOD WILL DISTRIBUTE CDS OF A RECORDING OF TAPS PRODUCED BY THE UNITED STATES ARMY BAND TO ALL CACS AND ACTIVE AND RESERVE COMPONENT UNITS FOR USE IF A BUGLER IS NOT AVAILABLE. LOCAL REPRODUCTION IS AUTHORIZED AND ENCOURAGED.

7. ARBITRARY GEOGRAPHIC LIMITS OF SUPPORT WITHIN CACS ARE ELIMINATED. CACS ARE TO PROVIDE APPROPRIATE MILITARY FUNERAL HONOR SUPPORT TO ALL VETERANS WITHIN THEIR COMPLETE GEOGRAPHIC AREA OF RESPONSIBILITY.

8. CACS MUST STILL ENTER MILITARY FUNERAL SUPPORT DATA INTO THE DOD WEBSITE. CACS HAVE BEEN PROVIDED THE UNIT IDENTIFICATION CODES (UICS) FOR THE WEBSITE. THIS IS A CRITICAL TASK AS THE INFORMATION EXTRACTED BY DOD FROM THE WEBSITE WILL BE USED TO DETERMINE FUTURE FUNDING AUTHORIZATIONS. IN ADDITION, CAC'S WILL SUBMIT A MONTHLY REPORT TO CASUALTY AND MEMORIAL AFFAIRS OPERATIONS CENTER, PERSCOM THAT INCLUDES THE NUMBER OF FUNERAL DETAILS PROVIDED BY "ACTIVE", "RETIREE", AND "VETERAN"; AND THE NUMBER OF SOLDIERS SENT ON EACH MISSION. THIS REPORT WILL BE DUE THE LAST WORKING DAY OF THE MONTH. DATA FROM THIS REPORT WILL BE USED TO BRIEF THE CSA AND WILL HELP DETERMINE FUTURE RESOURCING.

9. REQUEST THE FOLLOWING CHECKLIST PROCEDURES BE INCORPORATED INTO EACH INSTALLATION MILITARY FUNERAL HONORS SOP.

A. BEGIN COORDINATION WITH THE FUNERAL HONORS REQUESTOR ASAP; HOWEVER THE REQUEST MUST BE ANSWERED WITHIN 12 HOURS AFTER THE REQUEST IS MADE.

B. DETERMINE IF THE REQUIREMENT CAN BE FULFILLED USING TRAINED CAC PERSONNEL.

C. IF NOT, REQUEST ASSISTANCE FROM EITHER THE RSC OR STARC POC OR OTHER MILITARY ORGANIZATION IN YOUR AOR. THE RC SHOULD BE CONTACTED ON A ROTATING BASIS.

D. IF SUPPORT CAN NOT BE PROVIDED BY THE RC, REQUEST ASSISTANCE FROM A SISTER SERVICE. IF ASSISTANCE IS NOT FORTHCOMING, THE CAC IS STILL RESPONSIBLE FOR PROVIDING THE MILITARY FUNERAL HONORS.

E. IF REQUIREMENT CANNOT BE ACCOMODATED, COORDINATE WITH FUNERAL DIRECTOR TO HAVE THE INTERMENT HELD AT A DIFFERENT DATE AND/OR AT A DIFFERENT TIME WHEN THE REQUEST CAN BE ACCOMODATED.

F. CONFIRM ARRANGEMENTS WITH THE REQUESTOR.

G. ENSURE THE FUNERAL DETAIL IS PROPERLY TRAINED AND EQUIPPED WITH THE PROPER UNIFORM PRIOR TO DISPATCH.

H. ENSURE SUCCESSFUL EXECUTION OF THE BURIAL HONORS DETAIL AT GRAVESITE.

I. UPON COMPLETION OF THE MISSION, ENTER DATA INTO THE DOD WEBSITE AND SUBMIT THE MONTHLY REPORT TO PERSCOM.

10. FULL MILITARY FUNERAL HONORS FOR ACTIVE DUTY SOLDIERS AND MEDAL OF HONOR RECIPIENTS CONTINUE TO CONSIST OF A TEAM OF AT LEAST NINE SOLDIERS. THIS TEAM CONSISTS OF AN OIC OR NCOIC, BUGLER, CHAPLAIN, AND A SIX-SOLDIER PALLBEARER/ FIRING PARTY. THIS NINE-SOLDIER TEAM IS THE ARMY STANDARD FOR FULL MILITARY FUNERAL HONORS. LIKEWISE, CURRENT ARMY POLICY FOR MILITARY FUNERAL HONORS RENDERED TO RETIREES UPON REQUEST CONTINUES TO BE FULL MILITARY FUNERAL HONORS WHEN RESOURCES ARE AVAILABLE. IF FULL MILITARY FUNERAL HONORS ARE NOT POSSIBLE FOR A RETIREE, THE REQUIREMENT TO FURNISH A TWO-SERVICE MEMBER TEAM TO FOLD AND PRESENT THE INTERMENT FLAG AND TO RENDER TAPS REMAINS IN EFFECT. ONE OF THE MEMBERS OF THE TEAM MUST BE A MEMBER OF THE DECEASED RETIREE'S SERVICE.

11. THE POC FOR THIS ACTION AT PERSCOM IS LTC STEWARD OR MR. ELLIS AT DSN 221-5314/5304.





# **CHAPTER O**

## **FEDERAL ESTATE AND GIFT TAXATION**

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# FEDERAL ESTATE & GIFT TAXATION

## Outline of Instruction

### I. REFERENCES.

- A. AR 27-3, The Army Legal Assistance Program (10 Sep 1995).
- B. Army Regulation 27-26, Rules of Professional Conduct for Lawyers (1 May 1992).
- C. Internal Revenue Code.
- D. Federal Estate and Gift Taxes Explained (CCH) (1999).
- E. CCH Financial and Estate Planning Guide (CCH) (1998).
- F. Andersen, Understanding Trusts and Estates (1999).
- G. Beyer, Wills, Trusts, and Estates: Examples & Explanations (1999).
- H. March, Practical Applications of the Law: Wills, Trusts, & Estates (1998).
- I. Miller, Estate Planning Primer (CCH) (1998).
- J. Caron, Federal Wealth Transfer Tax Anthology (1998).
- K. Hoops, Family Estate Planning Guide (1994).
- L. Price, Price on Contemporary Estate Planning (1992).
- M. Stephens, Federal Estate and Gift Taxation (1991).
- N. JA 262, Wills Guide (1997) (*Military Estate Planning Guide, Fall 2000*).

## **II. INTRODUCTION.**

## **III. ESTATE BUILDING.**

### **A. Goal Setting.**

1. Adequate reserves to cover contingencies.
2. Pay for future educational needs of children.
3. Maintain financial security upon retirement.

### **B. Possible Techniques for Military Clients.**

1. Military Retirement / Survivor Benefit Plan (SBP).
2. The Principal Residence.
3. Individual Retirement Arrangements / Thrift Savings Plan (?).
4. Investments.
5. Life insurance.
6. Inheritance.
7. Lottery?

#### **IV. UNIFIED TRANSFER TAX SYSTEM (SEE APPENDIX A).**

- A. Concept.
- B. Lifetime and Testamentary Transfers - aggregated and taxed at unified tax rates (I.R.C. § 2001; see Appendix A).

##### Marginal Tax Rates

##### Minimum Rate

37% over \$675,000

##### Maximum Rate

55% over \$3,000,000

- C. Unified Credit.

<b>Year</b>	<b>Unified Credit</b>	<b>Gross Estate Equivalent</b>
1997	\$192,800	\$ 600,000
1998	\$202,050	\$ 625,000
1999	\$211,300	\$ 650,000
2000 and 2001	\$220,550	\$ 675,000
2002 and 2003	\$229,800	\$ 700,000
2004	\$287,300	\$ 850,000
2005	\$326,300	\$ 950,000
2006	\$345,800	\$1,000,000

D. Estate and Gift Tax Rates and Unified Credit Amount under The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA 2001).

<b>Calendar Year</b>	<b>Estate &amp; Gift Tax Deathtime Transfer Exemption</b>	<b>Highest Estate &amp; Gift Tax Rate</b>
2002	\$1 million	50%
2003	\$1 million (Unified Credit effective exemption amount for Gift Taxes remains at \$1 million.	49%
2004	\$1.5 million	48%
2005	\$1.5 million	47%
2006	\$2 million	46%
2007	\$2 million	45%
2008	\$2 million	45%
2009	\$2 million	45%
2010	N/A (taxes repealed)	Top individual rate under the bill (gift tax only)
2011	\$1 million	55% (Gift and Estate Tax) EGTRRA Sunsets.

## **V. THE FEDERAL GIFT TAX.**

- A. Scope. An excise tax on the transfer of property during donor's life.
- B. Determining Amount of Taxable Gift (I.R.C. §§ 2501 - 2524).
  - 1. Taxable gift – the total amount of gifts made during the year less the deductions and exclusions allowed.
  - 2. Exclusions and Deductions.
    - a. There is an annual exclusion of \$10,000 for gifts of a present interest made to any one person during a calendar year (I.R.C. § 2503(b)(1)).

Example 1: You gave your brother \$8,000 in cash last year. If it were your only gift, it is not a taxable gift because it is less than the annual donee exclusion.

- (1) Beginning in 1999, the annual exclusion amount (i.e., the \$10,000 amount provided in I.R.C. § 2503(b)(1)), is increased each calendar year by an inflation adjustment.
- (2) If the amount of the exclusion, as adjusted for inflation, isn't a multiple of \$1,000, it is rounded to the next lowest multiple of \$1,000. (I.R.C. § 2503(b)(2)).
- (3) Thus, the amount of the annual exclusion won't increase from \$10,000 to \$11,000 until the cost-of-living adjustment is at least 10%.
- (4) The annual exclusion is not available for gifts of future interests (either vested or contingent) (I.R.C. § 2503(b)(1)).



b. Gift-splitting. (I.R.C. § 2513).

- (1) Taxpayer or spouse gives gift to third party. Gift considered as if made one-half by taxpayer and spouse if both consent. If so, each takes the \$10,000 annual exclusion for parts of gift. As a result, a maximum exclusion of \$20,000 per donee is available to married couples.
- (2) Permits a married donor to treat a gift as though it were made one-half by the spouse. Thus, a married donor can avail himself of “two” annual exclusions (the donor’s and the spouse’s).
- (3) Split gifts can be made only while both spouses are alive and each is either a U.S. citizen or resident at the time the gift is made. (Treas. Reg. § 25.2513-1(a)).
- (4) Split gifts must be reported on a timely filed gift tax return. (Treas. Reg. § 25.2513-2(a)(1)).
- (5) Although the personal representative of a deceased spouse may consent on a gift tax return to a split gift, the gift must have been made during the consenting spouse’s lifetime. (Treas. Reg. § 25.2513-1(b)(1)).

Example 2: Harold and his wife, Helen, agree to split gift so that each can give gifts of more than \$10,000 without making a taxable gift. Harold gave Jeff \$17,000 last year. Harold's gift is treated as split in two, half (\$8,500) from Harold and half (\$8,500) from Helen.

c. The following are excluded from the definition of a gift for gift and estate tax purposes (gift tax returns are not required):

- (1) Payment of educational expenses (tuition) and medical care so long as the transfer is made directly to the educational institution or medical care provider. (I.R.C. § 2503(e)).

(a) IRS has ruled that this exclusion applied to a grandmother's payments of many years of future tuition for grandchildren. (Priv. Ltr. Rul. 1999-41-013 (July 9, 1999)).

(i) This allows individuals with large estates to pay tuition for future schooling free of gift taxes, and thereby reduce the size of their estates.

(ii) Making advance payments are beneficial for grandparents or older donors who because of health conditions may be unable to reduce their estates by substantial amounts.

(b) Transfers to qualified state tuition programs are not eligible for this unlimited gift tax exclusion.

(i) However, transfer to a qualified state tuition do qualify for the normal \$10,000 annual gift tax exclusion, and

(ii) Five years of annual exclusion gifts can be made to state tuition programs in a single year. (I.R.C. § 529).

(2) Gifts to charitable organizations (I.R.C. § 2522).

(a) Qualifies for a tax deduction in the current year, if the taxpayer itemizes (I.R.C. § 161).

(b) Evaluate making a charitable gift instead of a charitable bequest so that he can both decrease the estate and obtain an income tax deduction in the year of the gift.

d. Marital deduction (I.R.C. § 2523).

- (1) Gifts to U.S. citizen spouses get an unlimited marital deduction.
- (2) Gifts made to non-citizen spouse do not qualify for an unlimited marital deduction and only qualify for a \$106,000 annual exclusion (for 2001 as adjusted for inflation, Rev. Proc. 2001-13, 3.17(2), 2001-3 IRB ) rather than the \$10,000 (inflation adjusted) annual exclusion amount described above. Code (I.R.C. § 2523(i); Treas. Reg. § 25.2503-2(f)).

3. Gifts in excess of the annual exclusion.

- a. A gift in excess of the annual exclusion is subject to gift tax and reduces the client's unified credit.
- b. The value of adjusted taxable gifts is added back to the donor's estate to "gross up" the estate to the highest applicable marginal rate for estate tax purposes. (I.R.C. § 2001(b)).

4. Filing a gift tax return is required whenever a taxable gift is made regardless of whether any gift taxes are actually owed. Gift tax returns are due by April 15th in the year following the making of the gift. (I.R.C. § 6019)

C. Gift Tax Liability.

1. The donor is liable for gift taxes. (I.R.C. § 2501(a)(1)).
2. A gift is valued at fair market value at the time of transfer. (I.R.C. § 2515(a)).

D. Basis of Property Received as a Gift.

1. For property acquired by lifetime gift, the donee's basis is the same as the donor's basis with an adjustment for gift tax paid ( I.R.C. § 1015).
  - a. Upon sale of the property, the donee will be subject to tax on the appreciated gain.
  - b. If property is given to a person who dies within one year of receiving the gift and it is willed back to the donor (or his spouse), the basis of the property will be the original basis of the donor (no stepped-up basis at death of donee) (I.R.C. § 1014(e)).
2. Loss Property.
  - a. For the purpose of determining loss, the donee takes the fair market value at the time of the transfer. ( I.R.C. § 1015(a)).
  - b. Donor should consider selling property to take advantage of loss on his or her own income tax return.
3. Income tax considerations.
  - a. Step-up basis at death: good for highly appreciated assets transferred at death.
  - b. If want to give highly appreciated asset as a gift, there could be some income tax savings if gift is to someone in a lower income tax bracket.

E. Determine Gift Tax.

1. Determine total taxable gifts for the year.
  - a. Gift to the same individual during the year.
  - b. Reduce its value by the annual exclusion amount to arrive at the taxable gift.
  - c. Add all taxable gifts made to all individuals during that year to arrive at the total taxable gifts for the year.
2. Add all taxable gifts made in prior years.
3. Apply tax rate schedule.
4. Subtract the amount of taxes on all prior taxable gifts to determine this year's amount of gift tax.
5. Until unified credit amount, \$220,550 (for 2000-2001), has been used, no gift tax will be paid.

Example 3: After winning the state lottery in 2000, Ms. Winner gave her brother \$685,000 in 2000 and she gave him \$110,000 in 2001. Assume that Ms. Winner had not previously made any taxable gifts. Determine Ms. Winner's taxable gifts for 2000 and 2001. Must she actually pay any gift tax for 2000 or 2001?

## Gift Tax Computation

	<u>2000</u>	<u>2001</u>
Gift	\$685,000	\$110,000
- annual per donee exclusion	<u>10,000</u>	<u>10,000</u>
taxable gift	675,000	100,000
+ prior taxable gifts	0	675,000
Total taxable gifts:	\$675,000	\$775,000
Tax from tax schedule:	220,550	258,050
- Tax from prior year	0	0
Gift tax in current year:	220,550	258,050
Unified Credit	<u>220,550</u>	<u>220,550</u>
<b>Gift tax owed:</b>	<b>0</b>	<b>37,500</b>

## VI. LIFETIME TRANSFERS.

### A. Purposes for Making Lifetime Transfers.

1. Reduce state and federal tax liability.
2. Avoid probate.
3. Benefit individual, public, or charity.
4. Receive a charitable contribution deduction on federal income tax return (I.R.C. § 170; Treas. Reg. § 1.170A-1).
5. Qualify donor to receive public benefits (**Caution may be illegal to advise clients to do so as result of Health Insurance Portability Act of 1997**).
6. Keep future appreciation on gifted assets out of the donor's estate.

### B. Disadvantages.

1. Gift must be irrevocable.
2. Donee takes with a "carryover" basis.
3. Increases income tax liability of donee.

### C. Gift Giving.

1. Gifts between spouses.
  - a. Inter vivos gifts can be used to create an estate for the terminally ill spouse, equalize the spouses' estates, unwind joint tenancy and community property, and preserve a charitable income tax deduction.

- b. The healthy spouse could transfer appreciated property to the terminally ill spouse and if the property is transferred back to the donor (healthy spouse), that spouse will obtain the decedent's estate tax basis in the property, provided the original transfer occurred more than one year before the ill spouse's death. (I.R.C. § 1014(e)).
  - c. Because of the unlimited marital deduction, there are no gift tax consequences to inter vivos transfers between spouses. If, however, the donee spouse is not a U.S. citizen, the unlimited marital deduction does not apply. The maximum amount a donor spouse can transfer annually free of gift tax to a noncitizen spouse is \$106,000, provided the gift is of a present interest and is in a form that would qualify for the marital deduction if it were made to a U.S. citizen spouse. (I.R.C. § 2523(i)(2) and 2503(b)).
2. Annual exclusion gifts when death is imminent are almost always appropriate.
- a. However, a gift does not provide a step-up basis, so gifts of highly appreciated assets may not be desirable.
  - b. When death is imminent, the client should make gifts that will not be included in the estate if the client dies within three years of the gift. (I.R.C. § 2035(d)).
  - c. Use of Durable Powers of Attorney (DPOA) to make gifts.
    - (1) DPOA must expressly authorize making gifts. For example, see *Estate of Swanson v. U.S.*, 2000 U.S. Claims LEXIS 46 (March 13, 2000).
    - (2) Exception: Virginia and Alabama.
    - (3) Any unauthorized gifts made pursuant to the DPOA are includable in the donor's estate.



3. Selecting assets to give as gifts.
  - a. Do not give property with a basis higher than its current fair market value (FMV) if the donee is someone other than the donor's spouse.
    - (1) Instead, the donor should sell the property, realize the loss (for income tax purposes) and make a gift of the proceeds.
    - (2) If the property is given away, the donee's basis in the property for determining a loss is its FMV at the time of the gift. (I.R.C. § 1015(a)).
    - (3) If the donee is the donor's spouse, the donor should make an inter vivos marital deduction gift to the spouse in order to preserve the potential tax benefits. The donee spouse will receive the donor spouse's adjusted basis for purposes of determining loss. I.R.C. § 1041(b) expressly overrides the general rule of I.R.C. § 1015.
  - b. Do not give away property with a positive tax attribute, such as property that generates tax-exempt income or is expected to produce an income tax loss or that shelters other income.
  - c. Do not give away property that is encumbered and that has a basis less than the present balance of the encumbrance. The assumption of the indebtedness by the donee will cause the donor to realize gain to the extent the debt exceeds the basis of the property.
  - d. Do not give "donor-owned" life insurance if death is imminent. A gift of the incidents of ownership in a life insurance policy within three years of death will not remove the policy proceeds from the donor's estate because of the three-year recapture rule of I.R.C. § 2035(d)(2).

- e. It is almost always better to give cash, and it certainly is better to receive cash!

D. Gifts to Minors (see Appendix C).

1. Outright gift.

Advantages	Disadvantages
The entire property is removed from the transferor's estate.	The property is gone! The transferor has lost the income and use of the property as an asset.
The property's future appreciation is removed from the transferor's estate.	The recipient of the property may not have sufficient maturity, judgment, or expertise to properly manage the property.
Income produced by the property is shifted to the recipient, often in a lower tax bracket than the transferor.	The recipient takes a carryover basis (same as the transferor's basis) in the property.
	The property is subject to the claims of the recipient's creditors.

2. Trusts and UGMAs/UTMAs.

E. Tax on Unearned Income of Children Under 14 (see IRS Publication 929, Tax Rules for Children and Dependents).

- 1. Children under 14 may have to pay tax as if part of their unearned income (e.g., dividends, interest) had been received by their parents. The first \$700 of the under-age-14 child's unearned income is tax-free, and the second \$700 is taxed at the child's rate (usually 15%). Any unearned income over \$1,400 is taxed to the child at the parents' marginal rate.
- 2. The tax applies whether property was transferred to child as gift under a custodian arrangement (Uniform Gift to Minors Act), trust, inheritance, or unearned income generated from savings.

3. Allocable parental tax means the tax that would be imposed on the parents' taxable income if their income included the net unearned income of all of the parents' children under 14.
  - a. If more than one child under 14 is involved, must determine each child's share of allocable parental tax.
  - b. Child's tax liability must be recomputed if there's a change in the parent's tax.
  - c. If child's parents are divorced, the parental tax is based on the income of the custodial parent.
4. Reporting the income.
  - a. On parents' return - Form 8814.
  - b. On child's return - Form 8615.

## **VII. THE FEDERAL ESTATE TAX.**

- A. Scope. An excise tax on the transfer of property at death.
- B. Property Included in the Gross Estate (I.R.C. §§ 2033 - 2046).
  - 1. Property decedent owns at death. (I.R.C. § 2033).
  - 2. Life insurance. (I.R.C. § 2042)
  - 3. Annuities (e.g., SBP). (I.R.C. § 2039)
  - 4. Property transferred with certain "strings attached." (I.R.C. §§ 2036, 2037, & 2038).
  - 5. Joint property. (I.R.C § 2040)
    - a. The value of property decedent owned in joint tenancy with a right of survivorship, except to the extent it can be shown that the surviving co-tenant contributed to the acquisition of the property.
    - b. Special rules apply to certain joint interest held by spouses, in which each spouse will be considered as owning one-half interest in the joint property for estate tax purposes.
      - (1) The estate of the first spouse to die includes only one-half of the value of a "qualified joint interest" in property regardless of which spouse furnished the consideration for the property. For purposes of this provision, "qualified joint interest" is defined as any interest in property held solely by spouses as joint tenants with the right of survivorship or as tenants by the entirety. (I.R.C. § 2040(b)).

- (2) For gifts made to noncitizen spouses after July 14, 1988, the entire value of jointly held property is includible in the deceased spouse's estate, reduced by the portion of the property for which consideration was received. (I.R.C. § 2056(d)(1)(B)).
  - 6. The value of all property with respect to which the decedent had a general power of appointment at death. (I.R.C. § 2041)
  - 7. The value of certain transfers of life insurance by the insured; releases or exercises of general powers of appointment; and releases of certain powers in property interests retained from previous inter vivos transfers (within three years before death). (I.R.C. § 2035).
- C. Deductions from the Gross Estate (I.R.C. §§ 2051- 2056).
- 1. Expenses and indebtedness (I.R.C. § 2053).
  - 2. Losses (I.R.C. § 2054).
  - 3. Charitable bequests (I.R.C. § 2055).
  - 4. Marital deduction (I.R.C. § 2056).
    - a. Eligibility.
      - (1) U.S. citizen spouses get an unlimited marital deduction.
      - (2) Non-U.S. citizen spouses do not get a marital deduction. (However, can set up a Qualified Domestic Trust - § 2056A).

b. Effects.

- (1) Any amount given during life (I.R.C. § 2523) or at death (I.R.C. § 2056) to a surviving U.S. citizen spouse escapes federal estate tax at decedent's death.
- (2) Tax deferral for survivor's lifetime.
  - (a) The unlimited marital deduction for a citizen spouse permits the first spouse to die to pass his or her entire estate to the surviving spouse without any federal estate tax being due.
  - (b) At the surviving spouse's death, however, a federal estate tax will be due on whatever property the surviving spouse still owns or has the right to benefit from.
  - (c) Because the property passing under the marital deduction will be diminished by the estate taxes payable at the later death of the second spouse, some planning may be appropriate.

D. Additional Federal Estate Tax Rules.

1. Inherited property is not income to the recipient. (I.R.C. § 102).
2. Inherited property gets a stepped-up basis. (I.R.C. § 1014).

3. Effect of EGTRRA 2001: Generally, the Tax Act of 2001 gives a person who receives property from a decedent who dies after December 31, 2009, an adjusted basis in the property equal to the lesser of their fair market value of the property on the date of the decedent's death, or the adjusted basis of the property in the hands of the decedent. (Tax Act of 2001 §§ 541, 542; IRC §§ 1014(f), 1022). Thus, the step-down in basis under present law for loss assets received from a decedent is preserved, while the step-up in basis for appreciated assets is eliminated. (Tax Act of 2001 §§ 541, 542; IRC §§ 1014(f), 1022(a)).
  - a. \$1.3 Million Aggregate Basis Increase. The Tax Act of 2001 permits the executor of a decedent's estate to allocate additional basis to and among a decedent's assets. The two basis adjustments are the \$1.3 million "aggregate basis increase" and the \$3million "spousal property basis increase."
  - b. The Tax Act of 2001 permits the executor of a decedent's estate to allocate among the decedent's assets a \$1.3 million "aggregate basis increase." (Tax Act of 2001 § 542(a); IRC § 1022(b)(2)(B)).
    - (1) The allocation of the aggregate basis increase is made by the executor on an asset-by-asset basis, and cannot raise the basis of any asset above its fair market value on the date of the decedent's death. Once made, the allocation can be changed only as permitted by the Secretary of the Treasury. (Tax Act of 2001 § 542(a); IRC § 1022(b)(3)(B)).
    - (2) Estates of nonresidents who are not U.S. citizens will be allowed an aggregate basis increase of only \$60,000, rather than \$1.3 million, after December 31, 2009. The aggregate basis increase for estates of nonresident aliens is determined without the two adjustments for losses and loss carryovers. (Tax Act of 2001 § 542(a); IRC § 1022(b)(3)).

- (3) The \$1.3 million and \$60,000 figures are indexed for inflation after 2009. The \$1.3 million figure will be increased in increments of \$100,000, and the \$60,000 figure in increments of \$5,000. (Tax Act of 2001 § 542(a); IRC § 1022(d)(4)).
- c. \$3 Million Spousal Property Basis Increase. The Tax Act of 2001 permits the executor of a decedent's estate to increase the basis of property acquired from the decedent by the decedent's surviving spouse by \$3 million, in addition to any adjustments made by the \$1.3 million aggregate basis increase. (Tax Act of 2001 § 542(a); IRC § 1022(c). This is referred to as the "spousal property basis increase.")
- (1) The amount allocated to the property received from a decedent by the surviving spouse cannot increase its basis above the fair market value of the property on the date of the decedent's death.
  - (2) The spousal property basis increase is allowed only for property passing to a surviving spouse outright or in a qualified terminable interest property ("QTIP") trust. (Tax Act of 2001 § 542(a); IRC § 1022(c)).
  - (3) The \$3 million figure for the spousal property basis increase is indexed for inflation after 2009, in increments of \$250,000. (Tax Act of 2001 § 542(a); IRC § 1022(d)(4)).

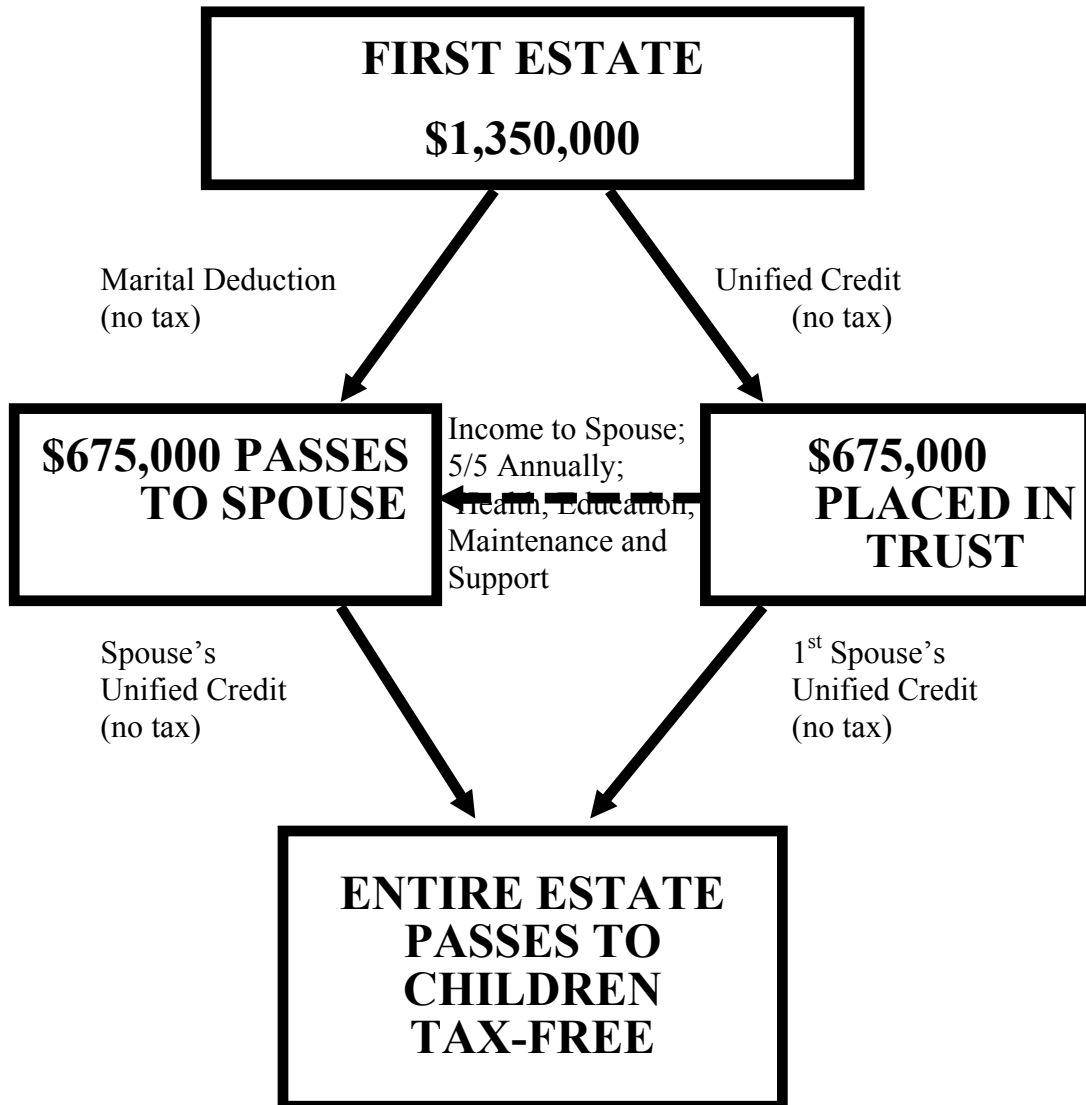


## **VIII. ESTATE PLANNING FOR SERVICE MEMBERS.**

A. When is more detailed estate planning necessary?

1. Gross estate > unified credit.
2. Non U.S. spouse.
3. “Mixed or blended” families.
4. Minor children or a disabled child.

B. Effective Use of the Unified Credit.



The key to maximizing the effective use of the unified credit is to have a measured amount of the estate (i.e., \$675,000 in 2000-2001) go to a "credit shelter" trust. This trust is taxed at the first spouse's death, with the tax being paid by the deceased's unused unified transfer credit. This "bypass trust" may provide a life income interest to the surviving spouse as represented above by the dotted line.

The same estate without estate tax planning, would result in a federal tax liability of approximately \$270,750 at the death of the second spouse.

C. Methods using the Unlimited Marital Deduction.

1. Outright gift of qualifying property.
2. Trusts.
  - a. Estate Trust - distributes to surviving spouse's (SS) probate estate at death, for estate tax and probate purposes. Not favored except where important to have income accumulated in trust and not paid out during SS's life. This is only type of marital deduction trust that allows income accumulation. All assets in this trust are in SS's estate for estate tax purposes and are subject to probate.
  - b. Marital Trust – (sometimes referred to as an “A Trust”) Spouse has the right to all income plus the right to say during life and / or at death who receives the remaining principal.
  - c. Qualified Terminable Interest Property (QTIP) Trust (Appendix B) - Spouse has the right to all income during life. No one else can benefit from the principal, but the donor (or decedent) can direct who will get the principal at the surviving spouse's death.

D. Methods using the Marital Deduction and Unified Credit.

1. Credit Shelter Trust (a.k.a. “By-Pass Trust” or “Exemption Trust”)
  - a. The credit shelter trust or A-B trust is designed to make certain that the unified credit of each spouse is used, while allowing the surviving spouse to have the use of the deceased spouse's assets during the remainder of his or her lifetime.

- b. A decedent can pass any size estate to his/her spouse without concern for the federal estate tax because of the unlimited marital deduction. However, when the surviving spouse later dies and passes the combined estate to his/her heirs, there is only the surviving spouse's unified credit to reduce the estate tax. This results in the first spouses unified credit amount being wasted.
- c. Because of tax deferral of the unlimited marital deduction, the taxation occurs at the death of the second spouse (if estate exceeds unified credit).
- d. To preserve the unified credit of the first spouse to die, many couples use a credit shelter trust. When the first spouse dies, an amount equal to (or less than) the unified credit is placed in the credit shelter trust. This trust is not taxed at that time or later at death of the surviving spouse, even though it may appreciate greatly in value.
- e. The surviving spouse can have access to the income from the credit shelter trust for life, and can use the principal if necessary for health, education, support and maintenance.
- f. Result:
  - (1) At the death of the surviving spouse the amount in the credit shelter trust is not included in the estate of the second spouse to die. The second spouse to die can then pass an estate to his/her beneficiaries up to their unified credit amount with any estate taxation.
  - (2) The credit shelter trust (Trust B) is generally not taxed at the death of either spouse. The marital share (Share A) is generally taxed when the surviving spouse later dies, but an estate less than the unified credit will result in no estate taxes payable.

2. Disclaimers (I.R.C. § 2518).

- a. Can be used as an **after**-death planning tool. Can be used to shift property to a younger generation while avoiding a gift tax liability to the disclaiming party.
- b. Beneficiaries are not forced to take what is coming to them under another person's will. The beneficiary disclaims a bequest.
- c. If a qualified disclaimer is made by someone who does not wish to accept an interest in property, the interest disclaimed will be treated for federal tax purposes as if it had never been transferred to that person, and he / she will not be treated as having made a gift, for either gift or estate tax purposes, to the person to whom the interest passes by reason of the disclaimer.
- d. A surviving spouse can make a valid disclaimer even though the property disclaimed goes to a trust in which he / she has an income interest, so long as this result is without the surviving spouse's direction. As a result, a provision is included in the decedent's will directing the disposition of any disclaimed property.
- e. Mechanics of disclaimers.
  - (1) To be effective for tax purposes, a disclaimer must be qualified. A qualified disclaimer is an irrevocable and unqualified refusal to accept an interest in property.

- (2) A qualified disclaimer must satisfy four requirements:
  - (a) The refusal must be in writing;
  - (b) The refusal must be received by the transferor, his or her legal representative, or the holder of legal title to the property not later than nine months after the day on which the transfer is made;
  - (c) The person who disclaims must not have accepted the interest or any of its benefits before making the disclaimer; and
  - (d) The interest disclaimed must pass to someone other than the person making the disclaimer without any direction on the part of the person making the disclaimer.

f. Both state and federal law applies to disclaimers.

- (1) State law determines ownership.
  - (a) The extent to which disclaimers are effective for nonprobate transfers is unclear in many jurisdictions.
  - (b) Both the UPC and the tax law recognize disclaimers of nonprobate transfers. UPC § 2-801; Treas. Reg. § 25.2518-2(c)(4).
- (2) Federal law determines tax consequences.

- g. Disclaimers and Joint Tenancy Interests.
- (1) In general, an individual must make a qualified disclaimer of the interest to which the disclaimant succeeds upon creation of the joint tenancy within nine months after the creation of the tenancy. Treas. Reg. § 25.2518-2(c)(4)(i).
  - (2) However, a qualified disclaimer of the survivorship interest must be made no later than nine months after the death of the first joint tenant to die. The timing for disclaiming the survivorship interest is not affected by the power of the disclaimant to unilaterally sever the tenancy under local law. *P.M. Kennedy*, CA-7, 86-2 USTC, rev'g TC, 51 TCM 232, CCH Dec. 42,804, TC Memo. 1986-3. Similarly, *J.S. Dancy Est.*, CA-4, 89-1 USTC, rev'g TC, 89 TC 550, CCH Dec. 44,184; *G.L. McDonald*, CA-8, 88-2, USTC, rev'g TC, 89 TC 293, CCH Dec. 44,118, cert denied.
  - (3) Special rules apply to disclaimers of joint tenancy interest in bank, brokerage, and investment accounts. The transfer creating the survivorship interest in a cotenant's contributions occurs on the death of the cotenant only if the cotenant possessed the right to unilaterally regain sole possession of the contributions. In such case, the surviving cotenant may make a qualified disclaimer within nine months of the deceased cotenant's death. Treas. Reg. § 25.2518-2(c)(4)(iii). In addition, a joint tenant may not make a qualified disclaimer of any portion of the joint interest attributable to consideration furnished by that tenant.
- h. For a good analysis of the law and case law of disclaimers, see, *Disclaimers: New Developments, Opportunities, and Unsettled Areas*, by Virginia F. Coleman, ALI-ABA Course of Study Materials, Advanced Estate Planning Techniques, Volume I, February 1999, available on LEXIS.

3. Credit Shelter or By-Pass Disclaimer Trust.
  - a. The will first makes an outright gift of all the desired property to the surviving spouse followed by an express provision that any property that the surviving spouse disclaims passes into a bypass trust for the surviving spouse's benefit.
  - b. The benefit for the bypass disclaimer trust is that the surviving spouse can examine the actual situation at the time of the deceased spouse's death and make the best decision.
4. Qualified Terminable Interest Property Trust (QTIP Trust) (a.k.a. "A-B-C Type Trust") (I.R.C. § 2056(b), see Appendix B).
  - a. Sometimes a third trust is added to the A-B Trust called a QTIP trust.
  - b. The QTIP allows the first spouse to die to give lifetime benefits (like income earned on the trust assets) to his / her spouse, while still retaining the right to name the persons who will ultimately receive the trust assets.
  - c. Useful in protecting children of a prior marriage from being cut off by the surviving stepparent.
  - d. Reduces the possibility of estate passing to a subsequent marriage partner or "close friend" of the surviving spouse.



5. Qualified Domestic Trust (QDOT) (I.R.C. § 2056A, see Appendix G).
  - a. Transfers at death to a non-citizen spouse will not qualify for the unlimited marital deduction unless the assets pass to a QDOT.
  - b. If a QDOT is not used, then all assets above the decedent's unified credit amount are taxable upon transfer to a non-citizen spouse.
  - c. The QDOT rules require a U.S. Trustee and other measures that help ensure collection of estate tax at the surviving non-citizen spouse's later demise.
  - d. Gift Tax Note: Can gift up to \$100,000 per year to non-citizen spouse during life.
  - e. QDOT Requirements:
    - (1) Essentially a QTIP with QDOT language established in the will;
    - (2) At least one trustee is a U.S. citizen / domestic corporation;
    - (3) Any distribution of corpus is subject to estate taxation while income is not;
    - (4) Trustee must make irrevocable election on estate tax return;
    - (5) If the trust assets are over \$2 million certain security arrangements required.

## **IX. ESTATE TAX RETURN.**

### **A. Steps in filing the estate tax return.**

1. Executor files Form 706.
2. Filed only if gross estate exceeds \$675,000 in 2000 - 2001.
3. File no later than nine months after date of decedent's death unless extension obtained.
4. The estate tax is due when the return is filed unless an extension is obtained.
5. Form 706NA required for estate of nonresident alien if that part of the gross estate situated in U.S. exceeds \$60,000.

### **B. Determining the Taxable Estate.**

**GROSS ESTATE** (as defined in §§ 2033-2044)

**LESS:**

- i) Administrative expenses, losses, indebtedness, etc. (deductible under §§ 2053 and 2054);
- ii) Marital deduction (deductible under § 2056); and
- iii) Charitable deduction (deductible under § 2055).

**EQUALS:** TAXABLE ESTATE (as defined by § 2051).

**ADD:** The amount of all taxable gifts made during life that are not included in the gross estate.

**EQUALS:** The "Grossed up estate."

**DETERMINE** tentative tax from Tax Schedule.

**SUBTRACT:** The amount of gift tax payable on all prior taxable gifts not included in gross estate.

**REDUCE** by the unified credit to determine estate tax due.

**EQUALS** the amount of estate tax due.

## FEDERAL ESTATE TAX ILLUSTRATION

### CALCULATION OF FEDERAL ESTATE TAX

EXAMPLE 4: MS. WINNER DIES IN 2001.

STEP 1:	Gross estate:		\$ 950,000
STEP 2:	Deductions:		
	Admin. expenses:	50,000	
	Marital deduction:	0	
	Charitable deduction:	100,000	<u>150,000</u>
STEP 3:	Taxable estate:		800,000
	PLUS: Sum of taxable gifts:		<u>775,000</u>
	= Grossed up estate		1,575,000
STEP 4:	Tax on \$1,575,000		589,550
STEP 5:	Subtract gift tax <b>payable</b> on prior gifts:		
	Total gifts:	\$775,000	
	Tentative tax:	258,050	
	LESS unified credit:	<u>220,550</u>	
	= Gift tax payable:		37,500
STEP 6:	Gross estate tax		552,050
	LESS unified credit:		<u>220,550</u>
	Estate tax due:		\$331,500

## X. CONCLUSION.



## APPENDIX A

### FEDERAL ESTATE AND GIFT TAX RATE SCHEDULE

COLUMN A	COLUMN B	COLUMN C	COLUMN D
Taxable amount over	Taxable amount not over	Tax on amount in Column A	Rate of tax on excess over amount in Column A
\$	\$	\$	Percent
0	10,000	0	18
10,000	20,000	1,800	20
20,000	40,000	3,800	22
40,000	60,000	8,200	24
60,000	80,000	13,000	26
80,000	100,000	18,200	28
100,000	150,000	23,800	30
150,000	250,000	38,800	32
250,000	500,000	70,800	34
500,000	750,000	155,800	37
750,000	1,000,000	248,300	39
1,000,000	1,250,000	345,800	41
1,250,000	1,500,000	448,300	43
1,500,000	2,000,000	555,800	45
2,000,000	2,500,000	780,800	49
2,500,000	3,000,000	1,025,800	53
3,000,000	.....	1,290,800	55

## Using the Unified Rate Schedule

Assume you are single and have a taxable estate of \$700,000. Look in column A until you see "Taxable amounts over \$500,000" and in column B, "Taxable amounts not over \$750,000." In column C, you see that the tax on \$500,000 is \$155,800. In column D, you see that the excess amount over \$500,000 is taxed at a 37% rate; \$700,000 minus \$500,000 = \$200,000. A tax of 37% on \$200,000 is \$74,000. Add that amount to \$155,800 to get the tentative tax of \$229,800. This amount is reduced by the unused unified credit, \$220,550. Thus, estate tax liability here is \$9,250.

This same tax table is used to determine gift tax liability. Assume you make a single gift of \$200,000. The tax would be computed as follows: First, deduct the \$10,000 annual per donee exclusion from the \$200,000. The tax on the remainder (\$190,000) is \$38,800 (the tax on \$150,000) plus \$12,800 (32% of \$40,000). The total tentative tax is \$51,600. If you have previously used your unified credit, you will owe \$51,600. If you have not used any of your unified credit, you pay no tax on this gift, instead using \$51,600 of your unified credit, leaving a \$168,950 credit remaining (or more, since the unified credit is steadily increasing until 2006) to offset future gift or estate taxes.

## **APPENDIX B**

### **QUALIFIED TERMINABLE INTEREST PROPERTY (QTIP)**

The unlimited marital deduction is not available for property passing to the surviving spouse if the interest will terminate or fail because of a lapse of time or the occurrence of an event or the failure of an event to occur and then pass to some other person (I.R.C. § 2056(b)). If the surviving spouse's interest will terminate upon his/her death or remarriage, the interest is terminable and does not qualify for the marital deduction. It will not be included in the surviving spouse's estate. This terminable interest rule ensures that property escaping estate tax on the death of the decedent spouse will be subject to tax on the subsequent death of the surviving spouse.

For decedents dying after 1981, The Economic Recovery Tax Act of 1981 introduced the QTIP concept. Under this concept, if the bequest passes to a QTIP trust and the decedent's executor elects QTIP treatment, taking the marital deduction, such deduction will be allowed. To qualify, the surviving spouse must be entitled to receive all the income from the trust, payable at least annually, for life, and no one may have the power to appoint the property to any third person during the surviving spouse's lifetime. Because this type of bequest does not require the surviving spouse to have the ultimate power of disposition over the trust assets, many estate owners prefer it to the outright bequest. By using a QTIP trust, the decedent can leave the surviving spouse the income only during the survivor's life and the remainder to the children on the surviving spouse's death. This device enables the decedent to defer the estate tax until the surviving spouse's death, without giving the surviving spouse control over the ultimate disposition of the marital deduction bequest.

The value of the bequest to a QTIP trust qualifies for the marital deduction only if the decedent's executor elects to take it on a timely filed federal estate tax return. The election is irrevocable (I.R.C. § 2056(b)(7)(B)(v)). It may not always be beneficial to make the QTIP election, because the assets in the QTIP trust will be includable in the surviving spouse's estate (I.R.C. § 2044).

Consider a situation where Husband's will divides his \$1,350,000 estate into two trusts: \$675,000 in a QTIP trust; \$675,000 in a left over or residuary trust. The provisions of both trusts are identical: income to Wife for life, principal to Children upon Wife's death. Wife has no other powers over, or interests in, either trust. When Husband dies, his executor elects to have the QTIP trust qualify for the marital deduction. Husband's estate pays no tax (\$675,000 marital deduction and \$675,000 exemption equivalent to the credit). When Wife dies, while the value of the QTIP trust is taxed in Wife's estate because of the election made by Husband's executor, that \$675,000 is offset by Wife's own credit.

## APPENDIX C

### BASIC FORMS OF GIFTS TO MINORS COMPARED

Item Compared	Outright Gift	Custodianship	Guardianship	Trusts		
				Regular	Sec 2503(b)	Sec 2503(c)
Use of income for minor	Generally, no	Yes	Yes	Trust controls	Mandatory Distribution	Discretionary
Use of principal for minor	Generally, no	Yes	Yes	Trust controls	Trust controls	Discretionary
Close judicial supervision	No	No	Yes	No	No	No
Accounting	No	Record kept; possible accounting	Yes	Generally, only private records kept		
Investments	Unlimited	Limited	Generally, unlimited	Generally, unlimited--within donor's control		
Minor gets title when:	Immediately			On termination or earlier distribution of income or principal		
Minor gets possession when:	Immediately	Age of majority		Trust controls		Generally, age of majority
Minor can dispose of gift property	Generally, at majority; younger for money	Age of majority		Trust controls		
Fiduciary's death	No fiduciary	Possible inclusion of fund in fiduciary's estate	No effect, except on successor appointment	No effect, generally, if trust is irrevocable and settlor retains no interest; otherwise includable in settlor's estate		
Minor's death	Heirs of minor take unless minor has will effective under local law			Trust controls		Estate of minor or appointees
Tax liability-distributed income	Minor*	Minor is generally taxable except as it is used to discharge parent's obligation of support (then taxable to parent)				
Tax liability-undistributed income	Minor*			Trust	Must distribute	Trust
Gift tax annual exclusion	Yes	Yes	Yes	If present income interest	Yes	Yes
Exclusion of gift from donor's estate	Yes	Yes, except if donor is custodian	Yes	Yes, except if settlor dies possessing forbidden powers or rights		Yes
Cost	None or minimal	None or minimal	Legal fees, bonding costs, possible guardian fees	Legal fees varying with complexity, size of trust and other factors, possible trustee fees		

\* Unearned income of a minor under the age of 14 in excess of \$1,400 annually is taxed at the parent's top rate, assuming the parent's rate is higher than that of the child.



## APPENDIX D

### COMMON TRUST TYPES - BENEFITS & TAXATION

Trust Type	Characteristics	Nontax Benefits	Tax Treatment		
			<u>Income</u>	<u>Estate</u>	<u>Gift</u>
Irrevocable Living	Settlor gives up property forever.	Supervised control & investment; avoids probate.	Currently distributed. Taxed to Bs. Accumulated first to trust, then to B on dist.	Not in settlor's estate unless life ins. on life transferred within 3 years of death.	Taxable to settlor. Annual exclusion available for present gift of income interest, not remainder.
Revocable Living	Settlor can revoke. May be funded or unfunded.	Same as above.	Taxable to settlor.	Includable in settlor's estate.	No liability.
Testamentary	Created by will.	Supervised control & investment.	Same as for irrevocable living trust.	Includable in creator's estate. Can avoid tax on death of life B.	No liability.
Grantor Retained Interest Trust (GRIT), GRAT, GRUT	Grantor reserves a qualified term interest in the form of an annuity or unitrust under I.R.C. § 2702, after which principal passes to remaindermen.	Often negligible.	Taxable to settlor (grantor).	Not taxable in grantor's estate unless grantor dies w/in reserved income term, subject to special rules under I.R.C. § 2702.	Tax based on value of remainder at time of creation of trust.
Standby	Generally revocable, but may be irrevocable on settlor's permanent disability.	Supervised control and investment on settlor's disability or absence.	Taxable to settlor.	Includable in settlor's estate.	No liability.
Pourover	Living trust, revocable or irrevocable, funded or unfunded.	Receptacle for employee benefits, life ins. proceeds, estate assets.	Taxable to settlor.	Same as irrevocable or revocable trust depending on revocability.	No liability.

GRAT, Grantor retained annuity trust: a trust to which the grantor transfers income-producing property in exchange for the right to receive a fixed cash annuity for a specified term of years or for the grantor's life (the grantor's retained interest).

GRUT, Grantor retained unitrust: identical to the GRAT, except that, the grantor retains the right to receive a fixed percentage of trust value annually.

## **APPENDIX E**

### **XI. GENERATION-SKIPPING TRANSFER TAX (I.R.C. §§ 2601-2663).**

Defined. A tax on a generation-skipping transfer, i.e., a transfer of income or principal to a beneficiary assigned to a generation at least two generations below the generation of the transferor.

### **XII. CONCEPTS.**

- A. Skip Person - person who is two or more generations below transferor's generation.
- B. Generation-Skipping Transfers (GST).
- C. Taxable Termination.
- D. Direct Skip.
- E. Taxable Distribution.
- F. Tax Computation.
- G. Valuation.
- H. Who Pays?

I. Tax Base and Liability.

1. Taxable distribution. The base for the GST is the value of the property received by the transferee, reduced by any expenses incurred by the transferee in connection with the determination or collection of the GST tax. If the trust pays the GST tax for the recipient of a taxable distribution, the amount of the GST so paid is considered a taxable distribution. The transferee is liable for the GST tax.
2. Taxable termination. The taxable amount of a taxable termination is the fair market value of all property at the time of termination with respect to which the taxable termination has occurred, reduced by the allocable deductions. The trustee is liable for the GST tax.
3. Direct skip. The taxable amount of a direct skip is the fair market value of the property received by the transferee. The GST tax base does not include the amount of any federal estate or federal gift tax payable with respect to the transfer.
  - a. If the direct skip is a taxable gift, the amount of the gift for purposes of the federal gift tax is increased by the amount of any GST tax imposed on the transferor with respect to the gift (I.R.C. § 2515).
  - b. In the case of a direct skip from other than a trust, the transferor is liable for the GST tax (I.R.C. § 2603(a)(2) and (3)).

J. Exemption and Exclusion.

1. A \$1,060,000 exemption allocable by the transferor or his executor to any property the transferor has transferred that is subject to GST. (Code Sec. 2631(a); Rev. Proc. 2001-13, 3.18, 2001-3 IRB).

2. Predeceased child exclusion. A transfer is not considered a direct skip where the transfer is made to a grandchild of the transferor (or of the transferor's spouse or former spouse) if the parent of the recipient is a lineal descendant of the transferor and is dead at the time of the transfer.
3. Special exclusions. Excluded from the GST tax are any amounts paid on behalf of an individual for educational and medical expenses and the annual per donee exclusion.

K. Tax Computation. The amount of the GST is the taxable amount (tax base) multiplied by the "applicable rate" (I.R.C. § 2602).

1. Applicable rate - the maximum federal estate tax rate in effect on the date of the generation-skipping transfer multiplied by the "inclusion ratio" (I.R.C. § 2641).
2. Inclusion ratio - the reciprocal of a fraction that has, as its numerator, the amount of the GST exclusion allocated to the trust (or direct skip property) and, as its denominator, the value of all the property transferred to the trust (or transferred in the direct skip) less any federal estate or death taxes actually paid from the property).

Example: On Parent's death in 2001, \$2,000,000 was transferred in trust for grandchild. Assume the full \$1,060,000 GST exemption is allocated to the trust and that there are no permitted deductions. The inclusion ratio is:

$$1 - \frac{\text{GST exemption}}{\text{property value}} \text{ or } \frac{\$1,060,000}{\$2,000,000} = .53$$

The GST tax rate is  $.53 \times .55 = .29$ , and the GST is  $.29 \times \$2,000,000$  or \$583,000.

- L. Planning Consideration. Transfers that "skip" a generation are subject to special complex tax rules that ordinarily are beyond the scope of legal assistance.

## GENERATION-SKIPPING TRANSFER TAX COMPUTATION

In 2001 Grandfather gave Grandchild \$2,010,000.

Determine the taxable gift, the gift tax, and generation-skipping transfer tax (GSTT) liabilities (without regard to the \$1,000,000 exemption). Assume further that the grandfather paid the GSTT for the grandchild.

### GENERATION-SKIPPING TAX

Taxable gift:	\$2,000,000
(gift less annual exclusion)	
Applicable rate:	<u>.55</u>
GST tax:	\$1,100,000

### GIFT TAX

Taxable gift:	\$2,000,000
+ GST tax	<u>\$1,100,000</u>
Total taxable gifts:	\$3,100,000
Tax (from schedule)	\$1,345,800
Unused unified credit:	<u>\$ 220,550</u>
Gift tax liability:	<b>\$1,125,250</b>

## **APPENDIX F**

### **FEDERAL TAX CONSEQUENCES UPON DEATH**

#### **XIII. DECEDENT'S FINAL INCOME TAX RETURN.**

- A. Filing requirements.
  - 1. A return on behalf of a decedent must be filed if 2000 gross income exceeds:
    - a. \$12,950 if a joint return is filed.
    - b. \$2,800 if married filing separately.
    - c. \$7,200 if filing a single return.
  - 2. A return should also be filed to obtain a refund. File Form 1310, Statement of Person Claiming Refund Due a Deceased Taxpayer.
  - 3. The executor or personal representative may file a joint return with the surviving spouse. If an executor or personal representative has not been appointed, the surviving spouse may file the joint return.
  - 4. If decedent dies after close of year, but before return is filed, a final return for the year of death must also be filed.

B. Income to Include in Final Return.

1. All income actually or constructively received before death must be included. All rules of income applying to individual taxpayers apply.
2. Death while Serving in a CZ/QHDA
  - a. A service member who dies while in a CZ/QHDA is entitled to an abatement of the income taxes for the tax year in which the death occurs. I.R.C. § 692(a). The abatement also applies if the death occurred as a result of wounds, disease or injury incurred while serving in a CZ/QHDA.
  - b. The income tax liability of a deceased service member is canceled for the last taxable year, ending on the date of death. The income tax liability is also canceled for any prior taxable year ending on or after the first day the service member served in a CZ/QHDA. I.R.C. § 692(a)(1); Treas. Reg. § 1.692-1(a)(2)(I). Upon the death of a service member as stated above, the service member will not be assessed any amount of income tax for prior taxable years. I.R.C. § 692(a)(2); Treas. Reg. § 1.692-1(a)(3).
  - c. A service member who dies in a CZ/QHDA is entitled to forgiveness of taxes for previous years in which the statute of limitations is still open. I.R.C. § 692(a)(2). The survivor is entitled to a refund of any taxes paid by the deceased service member in prior years for which the service member, if alive, could file an amended return. Generally, an individual can only file an amended return for three years. I.R.C. § 6511(a).
    - (1) For example, if a service member were to die in a CZ/QHDA in 2001 taxes owed or paid by that individual for 1998, 1999, 2000, and 2001 would be forgiven, provided that the survivor files the appropriate returns prior to 15 April 2002. If the survivor fails to file an amended return by 15 April 2002, the survivor could still receive a refund for tax paid by the decedent in 1998, 1999, and 2000, provided that the survivor files the appropriate returns prior to 15 April 2003.

- (2) To claim the refund, the surviving spouse needs to file a Form 1040, or a 1040X if it is an amended return with the Internal Revenue Service. Rev. Proc. 85-35, 1985-2 C.B. 433. In addition, Form 1310 and a certification from the Department of Defense or the Department of State that the death was the result of terrorist or military action outside the United States must be attached. If the return in question is for a joint return, an apportionment must be done between the decedent's income and the surviving spouse's income. See Treas. Reg. § 1.692.1(b); Rev. Rul. 85-103, 1985-2 C.B. 176; Major Mark Henderson, *Tax Law Note, Assisting Survivors When Spouse Died in a Combat Zone*, ARMY LAW., May 1997, at 68.
  - (3) The survivor will also be entitled to a refund of any income taxes that were withheld from the service member's income during the tax year in which the service member died. If there is or has been an assessment of unpaid tax, there is an abatement of the assessments. In addition, if the amount of unpaid tax was collected after the date of death of the service member, the amount collected will be credited or refunded as an overpayment.
- d. Where a service member has filed a joint return with his spouse, the tax abated, credited, or refunded will be prorated as a portion of the joint tax liability. The amount abated, credited, or refunded shall be an amount equal to the portion of the joint tax liability which is the same percentage of the joint tax liability as a tax computed upon the separate income of the service member is the sum of the tax computed upon the separate income of the service member and his spouse. Treas. Reg. § 1.692-1(b).
- e. If the service member was in a missing status, the date of the death will be considered to be the date on which there has been a determination of death made. I.R.C. § 692(b). However, there will not be a forgiveness, abatement, or refund of taxes beginning more than two years after the date of termination of combatant activities. I.R.C. § 692(b)(2). Therefore, where a service member has been MIA in a CZ/QHDA and is found to have died in an earlier year, the surviving spouse is allowed to treat the date of death as either the date on which the official determination is made that the service member died, or the date two years after combatant activities in the CZ/QHDA have terminated, whichever is earlier. I.R.C. 2 (a)(3); Rev. Rul 76-468, 1976-2 CB 202.



3. Income in respect of decedent.
  - a. Items of income that decedent earned or was entitled to before death (i.e., income that was not recognized for income tax purposes until after the decedent's death). Included in gross income of:
    - (1) The decedent's estate,
    - (2) The beneficiary, or
    - (3) Anyone to whom the property is properly distributed.
  - b. Character of income remains the same.
  - c. Special rules for Series EE bonds.
    - (1) Executor can elect to include all interest earned in decedent's return.
    - (2) If election is not made, the interest earned up to date of death is income in respect of decedent.

C. Deductions, Exemptions, and Credits.

1. Generally, the rules for deductions, exemptions, and credits are the same allowed to individuals.
2. Medical expenses paid before death are deductible on decedent's final return. Executor may also treat all medical expenses paid by the estate one year after the date of death as a deduction.
3. If deductions are not itemized, the full standard deduction may be claimed.
4. The personal exemption is allowed in full.

#### **XIV. ESTATE INCOME TAX RETURNS.**

- A. An estate is considered a separate taxable entity and continues to exist until the final distribution of assets of the estate.
  - 1. Must be reported on an annual basis - executor chooses accounting method.
  - 2. Tax is generally computed in the same manner, except no personal exemption is allowed and the standard deduction is only \$600. Also, an estate is subject to much higher tax rates.

B. Filing Requirements.

1. Form 1041, U.S. Fiduciary Income Tax Return, must be filed if estate Gross income exceeds \$600.
2. A Schedule K-1, Form 1041, must be provided to each beneficiary.
3. Form 1041-ES, Estimated Tax for Fiduciaries, must be filed if estate is open for over two years.
4. Copy of will need not be filed.

C. Taxable Income.

1. Gross income consists of all items of income received during year (interest, rents, royalties, dividends, etc).
2. Income in respect of decedent received by the estate before settlement.
3. Gain from sale of property if title has not yet vested in beneficiary.
  - a. Basis is fair market value or basis on alternative valuation date.
  - b. File Schedule D, Form 1041, to report capital gains.

D. Deductions.

1. Charitable contributions from income that is included in gross income.
2. Losses sustained on sale of property, or casualty and theft losses.
3. Medical and dental expenses paid by the estate (and not deducted on decedent's final return).
4. Expenses of administration not claimed as estate tax deduction.

5. Exemption deduction of \$600 per estate.

E. Distribution Deductions.

1. An estate is allowed a deduction for all income or property actually distributed to beneficiaries out of the estate.
2. The deduction for distributions is limited to "distributable net income" (DNI). DNI is determined on Schedule B, Form 1041. It is the estate's income available for distribution.
3. A distribution deduction may be taken for income even though distribution is not made until final dissolution.
4. Support allowances are deductible when made.

F. Termination of the Estate.

1. An estate will be considered terminated when all assets are distributed (even if a small amount is set aside for contingent liabilities).
2. Unused loss carryovers and deductions existing on termination of an estate are allowed to beneficiaries succeeding to the property.

## **XV. RECIPIENT'S TAX CONSEQUENCES.**

- A. Gifts and Bequests. Not income to recipient.
- B. Distributions to Beneficiary from Estate. Beneficiary reports all income estate is required to distribute and any other amount actually distributed or credited to the beneficiary to the extent of the beneficiary's DNI.

### **Example:**

**George's will required his estate to pay his wife \$5,000 a year and his daughter \$2,500 a year out of the estate's income during the period of administration. Assume the DNI for the year is only \$6,000. Since the DNI is less than the currently distributable income (\$7,500), the widow must include in her gross income only \$4,000.**

$$\frac{\$5,000}{\$7,500} \times \$6,000$$

**and the daughter must include only \$2,000 in her gross income:**

$$\frac{\$2,500}{\$7,500} \times \$6,000$$

## **XVI. TAX BASIS.**

- A. Stepped-Up at Death (I.R.C. § 1014).
  - 1. Effect of EGTRRA 2001: Generally, the Tax Act of 2001 gives a person who receives property from a decedent who dies after December 31, 2009, an adjusted basis in the property equal to the lesser of their fair market value of the property on the date of the decedent's death, or the adjusted basis of the property in the hands of the decedent. (Tax Act of 2001 §§ 541, 542; IRC §§ 1014(f), 1022). Thus, the step-down in basis under present law for loss assets received from a decedent is preserved, while the step-up in basis for appreciated assets is eliminated. (Tax Act of 2001 §§ 541, 542; IRC §§ 1014(f), 1022(a)).

- a. **\$1.3 Million Aggregate Basis Increase.** The Tax Act of 2001 permits the executor of a decedent's estate to allocate additional basis to and among a decedent's assets. The two basis adjustments are the \$1.3 million "aggregate basis increase" and the \$3million "spousal property basis increase."
- b. The Tax Act of 2001 permits the executor of a decedent's estate to allocate among the decedent's assets a \$1.3 million "aggregate basis increase." (Tax Act of 2001 § 542(a); IRC § 1022(b)(2)(B)).
  - (1) The allocation of the aggregate basis increase is made by the executor on an asset-by-asset basis, and cannot raise the basis of any asset above its fair market value on the date of the decedent's death. Once made, the allocation can be changed only as permitted by the Secretary of the Treasury. (Tax Act of 2001 § 542(a); IRC § 1022(b)(3)(B)).
  - (2) Estates of nonresidents who are not U.S. citizens will be allowed an aggregate basis increase of only \$60,000, rather than \$1.3 million, after December 31, 2009. The aggregate basis increase for estates of nonresident aliens is determined without the two adjustments for losses and loss carryovers. (Tax Act of 2001 § 542(a); IRC § 1022(b)(3)).
  - (3) The \$1.3 million and \$60,000 figures are indexed for inflation after 2009. The \$1.3 million figure will be increased in increments of \$100,000, and the \$60,000 figure in increments of \$5,000. (Tax Act of 2001 § 542(a); IRC § 1022(d)(4)).
- c. **\$3 Million Spousal Property Basis Increase.** The Tax Act of 2001 permits the executor of a decedent's estate to increase the basis of property acquired from the decedent by the decedent's surviving spouse by \$3 million, in addition to any adjustments made by the \$1.3 million aggregate basis increase. (Tax Act of 2001 § 542(a); IRC § 1022(c). This is referred to as the "spousal property basis increase.")
  - (1) The amount allocated to the property received from a decedent by the surviving spouse cannot increase its basis above the fair market value of the property on the date of the decedent's death.

- (2) The spousal property basis increase is allowed only for property passing to a surviving spouse outright or in a qualified terminable interest property (“QTIP”) trust. (Tax Act of 2001 § 542(a); IRC § 1022(c)).

2. The \$3 million figure for the spousal property basis increase is indexed for inflation after 2009, in increments of \$250,000. (Tax Act of 2001 § 542(a); IRC § 1022(d)(4)).

B. Stepped-Up Basis Suspended (I.R.C. §§ 2032 and 2032A).

**XVII. TAX RATES FOR ESTATES AND TRUSTS (I.R.C. § 1(e)).**

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$ 1 - 1,750	15%
1,750 – 4,150	28%
4,150 – 6,300	31%
6,300 – 8,650	36%
over 8,650	39.6%

## APPENDIX G

### NON-U.S. CITIZEN SURVIVING SPOUSES-- ESTATE & GIFT TAXATION RULES SUMMARIZED

#### DECEDENT's ESTATE TAX

**The Marital Deduction and the Noncitizen Surviving Spouse.** Because of the marital deduction, a decedent may give his entire estate (even one valued at several million dollars) to his surviving spouse without incurring any federal estate tax. The marital deduction reduces the gross estate by the value of the property that is in the gross estate passing to the surviving spouse (I.R.C. § 2056(a)). The Technical and Miscellaneous Revenue Act of 1988 (TAMRA) limits the marital deduction when the surviving spouse is not a U.S. citizen. I.R.C. § 2056(d)(1) now disallows the marital deduction where the surviving spouse is not a U.S. citizen *unless* the property passes to the surviving spouse in a "qualified domestic trust" (QDOT) or the surviving noncitizen spouse becomes a U.S. citizen before the date on which the decedent's estate tax return is filed (I.R.C. § 2056(d)(4)). This limitation also applies even if the property is owned jointly with right of survivorship (I.R.C. § 2056(d)(1)).

For a decedent whose surviving spouse is a noncitizen to use the marital deduction, the property must pass in a QDOT or be placed in a QDOT before the date on which the decedent's estate tax return is filed (I.R.C. § 2056(d)(2)). QDOT trust rules are in I.R.C. § 2056A:

1. The trust must require that at least one Trustee of the trust be an individual citizen of the U.S. or a domestic corporation.
2. The surviving spouse must be entitled to all income from the trust, payable at least annually.
3. The trust must meet the requirements of regulations to ensure the collection of estate tax from the trust.
4. The executor must make an election on the estate tax return claiming the marital deduction with regard to the trust.

**Planning Thoughts.** If the noncitizen spouse acquires U.S. citizenship (even while holding foreign citizenship), property passing to the surviving spouse qualifies for the marital deduction without a QDOT. This does, however, subject the former noncitizen surviving spouse's worldwide estate to U.S. estate tax, although there will be a credit for any foreign estate tax paid. Before advising a noncitizen spouse, consider any tax treaties and be sure to check for any foreign laws in the noncitizen spouse's country that might penalize the surrendering of foreign citizenship solely for estate tax purposes.



**Estate Tax.** For a nonresident who is not a U.S. citizen, only the value of his property located in the U.S. at death is subject to federal estate tax. The gross estate is determined in the same manner as the gross estate of a U.S. citizen or resident, without regard to the location of the property. Only the part located in the U.S., however, is subject to the federal estate tax (I.R.C. §§ 2103, 2104). With respect to the unified credit, where permitted by treaty, the estate of a nonresident alien is allowed the same unified credit as a U.S. citizen multiplied by the percentage of the total gross estate situated in the United States. In other cases, unlike U.S. citizens and residents who have a unified credit of \$220,550 (I.R.C. § 2010), a nonresident alien is allowed a unified credit of the greater of \$13,000 (which exempts the first \$60,000 of the estate from estate tax, see I.R.C. § 2102) or a pro rata share of \$46,800 based on the percentage of property located in the United States (I.R.C. § 2102(b)).

**Estate Tax Return.** If the decedent was neither a resident nor a citizen at death, file Form 706NA, United States Estate (and Generation-Skipping Transfer) Tax Return, Estate of nonresident not a citizen of the United States, if the value of the gross estate located in the U.S. exceeds \$60,000. The gross estate may be reduced in the same manner as for a citizen of the U.S. The return is due 9 months after the date of death unless an extension is granted. File the return with the Internal Revenue Service Center, Philadelphia, PA 19255. (See the instructions for Form 706NA for more information).

## **GIFT TAX**

**General.** The federal gift tax applies to the gratuitous transfer of property. The person making the gift (the donor) must generally pay the tax. If the donor does not pay the tax, the person receiving the gift (the donee) may have to pay it. Whether a person is subject to the gift tax may depend on whether the person is a U.S. citizen or resident. For an individual who is neither a citizen nor a resident of the U.S., the federal gift tax applies only to gifts of property in the U.S.

**Gifts to Noncitizen Spouses.** Like the marital deduction for estate tax purposes, there is a marital deduction for gift tax purposes (I.R.C. § 2523). Most gifts to citizen spouses are free from gift tax. For gifts to a noncitizen spouse made after July 14, 1988, however, there is no gift tax marital deduction (I.R.C. § 2523(i)). Instead, the annual \$10,000 per donee exclusion is increased to \$103,000 (I.R.C. § 2523(i)(2)). In addition, I.R.C. § 2523(i)(3) applies to lifetime transfers between spouses certain repealed provisions concerning the tax consequences of joint ownership between spouses. For example, this means that a transfer of real property owned by the spouses as tenants by the entirety to the noncitizen spouse alone will be a gift to the noncitizen spouse. The value of the gift for gift tax purposes will be based on the proportion of the value that the noncitizen-donee spouse receives in excess of the donee spouse's contribution to the purchase price. Thus, only annual lifetime gifts to non-citizen spouses less than \$106,000 now avoid the federal gift tax.

For gifts made after June 29, 1989, the \$103,000 annual exclusion for gift transfers to a noncitizen spouse is allowed only for transfers that would qualify for the marital deduction if the donee were a U.S. citizen. Thus, a gift in trust would not qualify for the annual exclusion unless it satisfies one of the exceptions to the terminable interest rule. The \$103,000 annual exclusion for gifts to a noncitizen spouse is available regardless of whether the donor is a citizen, resident alien, or a nonresident alien. On the other hand, a gift to a citizen spouse will qualify for a gift tax marital deduction regardless of the citizenship of the donor spouse.

**Example** (from IRS Publication 448): Don, a U.S. citizen, is married to Mary, a resident alien. In 1998, Don transfers to Mary 100 shares of X Corporation stock valued for federal gift tax purposes at \$130,000. The transfer is a gift of a present interest and is a deductible interest for gift tax purposes. Accordingly, \$103,000 of the \$130,000 gift is not included in the total amount of gifts made by Don during the calendar year for federal gift tax purposes. Don must report \$27,000 on his annual gift tax return, Form 709, as a taxable gift.



# CHAPTER P

## WILL DRAFTING

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# WILL DRAFTING

## *Outline of Instruction*

### **I. REFERENCES.**

- A. Legal Assistance Wills Guide, JA 262 (May 1997).
- B. Shaffer, The Planning and Drafting of Wills and Trusts (3d ed. 1991).
- C. Estate Planning and Taxation Coordination, RIA (1990).
- D. Schilling, Will Drafting (1988).
- E. West's Legal Forms (2d ed. 1985).
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- G. McGovern, Kurtz, and Rein, Wills, Trusts, and Estates, West (1988).
- H. Haskell, Preface to Wills, Trusts, and Administration, Foundation Press (1987).
- I. Bogart, Trusts (6th ed. 1987).
- J. Kess/Wesslin, CCH Estate Planning Including Financial Planning (1990 ed.).
- K. Plotnick and Leimberg, The Executor's Manual (Doubleday 1986).
- L. Dukeminer and Johanson, Wills, Trusts, and Estates, Little, Brown, and Company (5th ed. 1995).
- M. Peterson, The Uniform Transfers to Minors Act: A Practitioner's Guide, The Army Lawyer (May 1995).

### **II. INTRODUCTION.**

### **III. WILLS IN GENERAL.**

#### **A. Purpose of Wills.**

1. To reduce the intentions of the Testator to clear, concise written form that disposes of his property after his death with the minimal amount of shrinkage to the estate.
2. To provide for the care, maintenance and support of any minor aged beneficiaries.

#### **B. Avoiding Probate.**

1. Disadvantages of Probate.
  - a. Cost. The cost of probate is state specific but may not be that much.
  - b. Delays. The delays in processing probate can be lengthy depending on the state.
  - c. Publicity.
2. Methods of Avoiding Probate.
  - a. Lifetime gifts.
  - b. Living Trusts.
  - c. Joint Ownership with right of survivorship.

- d. Contractual arrangements with third party beneficiaries. For example:
  - (1) Payment on death (POD) or transfer on death (TOD) forms of registration on personal property (e.g., Individual Retirement Arrangements and bank accounts).
  - (2) Life insurance.

C. Advantages To Having a Will.

- 1. Statute of descent and distribution may not coincide with decedent's actual intent.
  - a. Client may move to a state with different intestate scheme or intestacy law may change before client dies.
  - b. Property owned in more than one state may be subject to different intestate schemes.
  - c. Transitory population of the military.
- 2. Cost of administering an intestate estate may be significantly greater.
  - a. Proceedings require court approval.
  - b. Administrator usually required to post bond.
  - c. Passing property to children may require appointment of a guardian of the property (conservator).
- 3. Will affords a testator the opportunity to nominate a suitable executor and alternate.



4. Will allows parents to make arrangements for minor children.
  - a. To appoint guardians of the persons and property of the child on the death of the surviving parent.
  - b. To select alternatives to outright bequests such as custodial accounts or testamentary trusts.
5. Will allows testator to minimize federal and state estate tax liability.

D. Obtain Data on Client and Family Circumstances.

1. Use Will Questionnaire and Will Checklist (See Appendix D for Will Drafting Checklist; DL Wills Program; and questionnaires available on the JAGCNet)
2. General Information.
  - a. Is client married?
    - (1) Is there a pre-nuptial agreement?
    - (2) Will spouse have right of election?
    - (3) Community property issues.
    - (4) Spouse's citizenship.

- b. Has client been divorced?
  - (1) Review separation agreement or divorce decree. Are there any continuing alimony, maintenance, or support obligations after death.
  - (2) Does ex-spouse have any claim to the estate?
  - (3) Has client changed insurance policies so ex-spouse is not the named beneficiary?
- c. Does the client have children?
  - (1) Number of children and age.
  - (2) Are any children under a disability?
  - (3) Does client intend to benefit after born children?
  - (4) Are any children step-children?
  - (5) Adopted children?
  - (6) Illegitimate children?
- d. Testator's Assets.
- e. Develop a complete inventory of the assets listing type of ownership, value, and probable date-of-death value.

- f. Debts and Claims Against Estate.
      - (1) Is any property encumbered?
      - (2) Does estate have sufficient liquid sums to pay debts?
  - 3. Coordinate Will with Other Non-Probate Assets.
    - a. Beneficiary selection on DD Form 93.
    - b. Commercial insurance.
    - c. Property ownership.
- E. Determining an Estate's Worth.
- 1. Probate vs. Non-Probate Estate.
    - a. Probate estate consists of property in the client's name only, with no contractual beneficiary designation, or property that would pass by intestacy if not for a will.
    - b. Non-probate estate consists of property that passes due to some sort of beneficiary designation or by operation of law.
      - (1) Jointly owned property with a right of survivorship—including bank accounts, stocks, or realty.
      - (2) Totten Trusts – “in trust for” bank accounts that pass to beneficiary.
      - (3) Insurance proceeds.

- (4) Employee benefits that pass to beneficiaries –IRAs, pension plans, SBP for military members.
  - (5) Property in Revocable/Irrevocable Inter Vivos Trusts.
- 2. Gross Estate. The gross estate is a combination of both the probate and non-probate estates. Determining the gross estate is essential to determine whether the client needs additional estate planning beyond a simple will.
- 3. How much is too much?
  - a. Single client. Someone with over \$675,000 in a gross estate would benefit from additional estate tax planning.
  - b. Married client. Consider the **combined gross estate** of the married couple in figuring the \$675,000 limit.
  - c. Decision is the client's after full disclosure of the limitations of a simple will versus the other estate planning options. If a client wants a simple will consider having them sign a memo to the effect they were counseled on the limitations and agree to have you draw up a simple will.

F. Types of Wills.

- 1. Holographic. Completely written and signed in the handwriting of the testator.
- 2. Oral. Typically, must be made during last sickness. Can generally only dispose of personalty.
- 3. Statutory fill in the blank wills.

4. Contractual Wills.

- a. Description. A contract between the Testator and someone else for the Testator to leave property a certain way usually in return for a promise for the other person to leave that property a certain way in their will.
- b. Avoid contractual wills.
  - (1) Not authorized under the Legal Assistance Program.
  - (2) Most commentators think they are a bad idea.

5. Joint and Mutual Wills.

- a. Description.
  - (1) A joint will is one will purporting to dispose of the property of two people.
  - (2) Mutual wills are two wills that virtually mirror the distribution provisions of each other.
- b. Mere execution of joint or mutual wills does not create a presumption of a contract not to revoke the will; either may be revoked at any time.

6. Formal Wills. Every state has a statute prescribing certain formalities but generally a formal will is:

- a. In writing;
- b. Signed by the Testator (or by another at the request of and in the presence of the Testator);

- c. Is published (declaration by the Testator that the instrument is testator's last will);
- d. Is witnessed or attested to, and
- e. All this is done in the presence of the witnesses and Testator.

7. Wills for domiciliaries of Puerto Rico and Louisiana.

G. Codicils.

- 1. A codicil may be executed to modify or add provisions to an existing will.
- 2. Must be executed with same formalities as a formal will.
- 3. It is generally preferable to execute an entirely new will instead of a codicil.

#### **IV. TESTAMENTARY ISSUES.**

A. Capacity.

- 1. Competent testator of sound mind and requisite age.
- 2. Who physically complies with state statutory requirements.
- 3. Possesses the intent to make the document his last will and testament. A testator must know and understand:
  - a. The nature and extent of his property;
  - b. The persons who are the natural objects of his bounty; and

- c. What disposition of his property he wants to effect.

B. Undue Influence.

1. Definition. Influence which deprives the person influenced of free agency or destroys freedom of his will and renders it more the will of another than his own.
2. Undue influence may invalidate the entire will in some jurisdictions or just the portion effected by the undue influence in jurisdictions that recognize the partial invalidity doctrine.
3. Duress and undue influence are closely associated but duress requires some unlawful threat. Undue influence is more a domination of the testator's mind.
4. Presumption of undue influence. A confidential relationship between the testator and someone who participates in the preparation of the will (even if not necessarily for their benefit) often leads to a presumption of undue influence.
  - a. The relationship of attorney and client, conservator and ward, trustee and beneficiary, doctor and patient, nurse and patient, and pastor and parishioner most courts classify as confidential.
  - b. The presumption arises when someone in this type relationship participates in preparing the will.

C. Classification of Gifts.

1. Specific Bequests.

- a. Definition: A gift of a specific article or part of a testator's estate which is identified and distinguished from all things of the same kind.
- b. Specific bequest can be useful to avoid property going to the residuary trust and possibly causing the executor to either sell or hold as non-income producing property.
- c. Reasons for making specific bequests.
  - (1) Heirlooms.
  - (2) Avoid fighting amongst beneficiaries.
  - (3) Sentiment.
  - (4) Control.
- d. Construction Problems. The wording of the specific bequest is important to classification and effecting the actual intent of the testator.
  - (1) Gifts of "my furniture" or "my automobile" are specific bequests but raise issues of construction regarding intent of the testator.
  - (2) Such terms should be defined where possible to account for the intent of the testator; construed at the time of execution? or time of death? Generally, courts construe such bequests as of the date of death.
- e. Change in Form of the Specific Bequest.



- (1) Changes in form only will not generally void the bequest.
- (2) Usually arises with intangible property. For example: Testator bequests his ABC stock to Mary but after execution and before Testator's death ABC Corporation merges with XYZ Corporation and Testator's ABC stock is converted to XYZ stock. Testator never changes his will and thus dies owning XYZ stock. Mary would get that bequest because it is a change in form.

f. Alternatives to Lengthy Specific Bequests.

- (1) Incorporate a separate writing by reference in the will.
- (2) A non-binding (or binding if allowed in that state) memorandum of instruction to the executor.
- (3) In either case, the separate document or the memorandum must exist at the time of the will's execution.
- (4) Memorandum or letter of instruction as to the distribution of personal property is permitted in 22 states.
- (5) Caution: Unclear designations can give rise to litigation.

2. Demonstrative.

- a. A sum paid from a specified sum.

"I give to Fred \$100 to be paid from the sale of my 1957 Chevy."

- b. May have a problem with ademption.

3. General Bequests.

- a. Definition. A bequest which is payable out of the assets of the estate generally and does not require the delivery to the beneficiary of any specific item.
- b. Generally cash gifts but not limited to cash. Usually a stated sum of money.
- c. Classification as a general bequest places an obligation on the estate to provide that gift.

#### 4. Conditional Bequests.

- a. Definition. A bequest which takes effect, or continues in effect, according to the happening of some future event.

“to X for tuition provided she is accepted in law school before her 25<sup>th</sup> year.”

- b. Generally conditions are valid unless too indefinite, illegal or against public policy.
- c. Conditional bequests often lead to litigation.

#### 5. Residuary Bequests.

- a. Definition. The property and assets remaining after debts, administrative expenses, and specific and general gifts are paid, and by its nature cannot be determined at the time of execution of the will.
- b. Usually, but not necessarily, the residuary beneficiaries are the primary objects of the testators affection and most of the estate passes under the residuary clause.

- c. Even if the entire estate appears to be disposed of by the other types of bequests/devisees always include a residuary clause to avoid intestacy as to omitted or after acquired assets.
- d. Helpful to use percentages rather than amounts.
- e. Residuary language from DL Wills:

**PARAGRAPH X:** I give, devise and bequeath all the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wherever located, that I own or to which I shall be in any manner entitled at the time of my death (collectively referred to as my "residuary estate"), as follows:

(a) If JERRY JEFF survives me, to JERRY JEFF .

(b) If JERRY JEFF does not survive me, my residuary estate shall be paid and distributed to BETTY LOU THELMA LIZ if she shall survive me.

(c) If none of the beneficiaries described in clauses (a) and (b) above shall survive me, then I give, devise and bequeath my residuary estate to those who would take from me as if I were then to die without a will, unmarried and the absolute owner of my residuary estate, and a resident of the State of Confusion.

#### D. Encumbered Bequests.

1. Generally, a beneficiary takes the gift subject to any liens or encumbrances on the property.
2. The Testator must specify in the will if their intent is that the estate will assume the cost of paying off any liens.

E. Disinheriting Relatives.

1. Spouse. Difficult to disinherit a spouse.

- a. Right of election. State statute governs what the right is but generally a spouse gets some share of the estate. The UPC fixes it at 1/3 of the estate. Some states increase or decrease the elective share depending on whether there are children.
- b. Timing. The elective share is not automatic. There is usually a time limit under which the right of election must be made by the spouse or she loses her interest.

2. Children and Other Relatives.

- a. Be specific in the will as to the intent to omit.
- b. Do not use precatory language to describe why the relative is disinherited.

3. DL Wills provisions disinheriting individuals.

**FIFTH:** I give and bequeath to XYZ the smallest portion of my estate, if any, required to be given to XYZ under applicable law, after taking into account the aggregate value of any other property passing to XYZ under this will or otherwise. It is my desire and intent that XYZ be disinherited by me to the fullest extent permitted by law. All provisions of this will, including without limitation any provisions which may refer to persons taking by intestacy, shall be construed to effectuate such disinheritance of XYZ.

**OR THIS IF DISINHERITING A CHILD:**

**THIRD:** I give and bequeath to my son BOB MARLEY, if he survives me, the smallest portion of my estate, if any, required to be given to my child under applicable law, after taking into account the aggregate value of any other property passing to my child under this will or otherwise. It is my desire and intent that my child be disinherited by me to the fullest extent permitted by law. All provisions of this will, including without limitation any provisions which may refer to my "child", "children" or "issue", and any provisions which may refer to persons taking by intestacy, shall be construed to effectuate such disinheritance of my child.

4. Pretermitted Heirs.

- a. Most states have statutes allowing an unmentioned child to take a share of the estate.
- b. Most pretermitted heirs statutes allow an intestate share to the omitted child.
- c. State statutes differ on several points—
  - (1) Many state statutes include only children who were born after the will was executed but some are not limited.
  - (2) Most states limit their pretermitted heirs statute to children but many cover issue of deceased children.
  - (3) Some states allow extrinsic evidence of an intent to omit but most require that the intent to omit appear from the will itself.
- d. DL Wills provision to provide for unborn children in will:

**FOURTH:** I give, devise and bequeath all the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wherever located, that I own or to which I shall be in any manner entitled at the time of my death (collectively referred to as my "residuary estate"), as follows:

(a) If my wife survives me, to my wife outright.

(b) If my wife does not survive me, then to those of my children who survive me and to the issue who survive me of those of my children who shall not survive me, in equal shares per stirpes.

F. Distribution of Property.

1. Per Stirpes Distribution.

a. “Per Stirpes” is Latin meaning “by roots”. A per stirpes disposition or distribution of property is made to persons who take as issue of a deceased ancestor in the following manner:

(1) The property so passing is divided into as many equal shares as there are

(a) Surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue and

(b) Deceased issue in the same generation who left surviving issue, if any.

(2) Each surviving member in such nearest generation is allocated one share.

(3) The share of a deceased issue in such nearest generation who left surviving issue shall be distributed in the same manner to such issue.

b. Thus, distribution per stirpes allows a grandchild of the testator to take by representation the share of the estate the grandchild’s deceased parent would have taken.

c. There are two variations of per stirpes distribution.

(1) Strict. The survivors divide equally the share their decendant would have taken.

(2) UPC. If all the takers are of the same generation they take equally.

- d. A memorandum that can be printed out as part of the DL Wills Program defines per stirpes:

The term "per stirpes" describes the way a bequest is to be divided among a person's issue. Most people want bequests to their children to be divided equally among the children. A per stirpes distribution does this, and it also governs what happens if any child has died. If a child has died, his (or her) share is divided among his issue if he has any issue. For example, presume that you have three children (Sue, Sally and John) and that your will provides for a bequest to your children per stirpes. If all three children survive you, each would get one third of the property. If, however, John has died, his one third share would be divided among his children if he had any, or if he had no living issue his one third share would pass to Sue and Sally.

## 2. Per Capita Distribution.

- a. "Per Capita" is Latin meaning "by the heads". This type of distribution allows survivors to take according to the number of individuals; share and share alike. The distribution of property is per capita when it is made to persons, each of whom is to take in his own right an equal portion of such property.
- b. "Issue per capita" can result in a slightly different distribution of property. A parent and child would receive equal shares while the parent is alive.
- c. Practice Pointer: Many clients select a per capita designation without realizing the drastic effect it may have on their grandchildren. The drafting attorney may want to add the following language to make sure the clients desire (and understanding) is clear:

"In equal shares to my children or to the survivors of them. It is my intent that should there be any grandchildren or other issue of one of my children who fails to survive me, those grandchildren or issue shall not share in any way in my estate."

3. Per Capita at each generation: A disposition or distribution of property made in the following manner to persons who take as issue of a deceased ancestor.
  - a. The property so passing is divided into as many equal shares as there are:
    - (1) Surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue and
    - (2) Deceased issue in the same generation who left surviving issue if any.
  - b. Each surviving member in such nearest generation is allocated one share.
  - c. The remaining shares, if any, are combined and then divided in the same manner among the surviving issue of the deceased issue as if the surviving issue who are allocated a share had predeceased the decedent, without issue.

G. Charitable Bequests.

1. Check for exact name and make sure it is on the IRS list of qualified charities.
2. Provide contingency in the will in the event the charity ceases to exist, changes name, or loses IRS qualification.



H. Funeral Arrangements and Special Instructions.

1. Funeral arrangements are best handled outside the will (See Appendix A).
2. Anatomical gifts may be made by will request.
  - a. Invalidity of will does not invalidate the gift.
  - b. It is generally better for the testator to make an anatomical gift through separate document (See sample form at Appendix B).
3. Consider making special requests by separate memorandum.

V. CHANGES AFTER EXECUTION OF THE WILL.

A. Ademption.

1. Property described in a **specific bequest** that is sold, transferred, or destroyed prior to testator's death "adeems." The estate is under no obligation to distribute another asset or pay for the failed gift.
2. For example, if a testatrix gives her son "my red car with serial number 1234567," but later sells that red car, the bequest adeems. Thus, upon her death, the son does not receive any property as a result of that specific bequest.
3. Malpractice tip: T draws will leaving realty to A; after will drawn attorney draftsman represents T in sale of realty, then T dies. Court held the devise to A adeemed. -Court held attorney liable in malpractice for not advising T of ademption, and thwarting T's intent. Held that beneficiary T could maintain action. Schreiner v. Scoville, No. 86-521 (slip opinion), Iowa, 1987.

B. Lapse.

1. The general rule at common law is that if a beneficiary dies after the execution of a will but before the testator, a **specific bequest** fails or lapses. Unless otherwise provided, a lapsed bequest becomes part of the residuary estate.
2. Testator can anticipate the death of an intended beneficiary and provide for an alternate or place a condition of survival on the gift.
3. All states have an "anti-lapse" statute substituting intended beneficiary's issue. The degree of relationship varies from state to state (almost always children and sometimes parents and siblings). These statutes prevent the bequest from automatically lapsing (and becoming part of the residuary estate).
4. Practice Pointer: Always determine the long range plan of the client and specifically provide for bequests in the event any beneficiary predeceases the testator.

C. Abatement.

1. If there are insufficient assets in the estate to pay its obligations, legacies, administration expenses, and taxes, legacies may have to be reduced.
2. Usually a tiered plan as to priorities pursuant to state statute (12 states do not have) usual plan. General priority to cover deficiencies:
  - a. Residuary loses first;
  - b. General legacies;
  - c. Demonstrative legacies; and
  - d. Specific bequests.

3. Classification of the gift can determine abatement hierarchy.

D. Simultaneous Death.

1. The Uniform Simultaneous Death Act (USDA) provides for common disaster situations where there is no proof of survivorship. Generally, the Act presumes property owner survives intended beneficiary. Purposes of USDA:
  - a. Avoids two probate proceedings within a short time.
  - b. Testator would probably want his property to flow to his relatives, not relatives of deceased beneficiary.
  - c. Could save estate taxes by avoiding doubling of estate of spouse.
2. USDA doesn't apply if the will provides for a different presumption.
3. Testator should consider providing for survivorship for a specified period as a condition of the bequest. USDA (1991 version) incorporates 120 hour survivorship requirement.
  - a. Extended survivorship requirement serves same policies served by original USDA without risking litigation over evidence of survivorship.
  - b. If the survivorship condition for gifts to a spouse exceeds six months, however, the marital deduction will be disallowed.
4. Almost all states have enacted the USDA, except Alaska, Louisiana, Montana and Ohio.

5. Practice Pointer:

- a. It is not only important to include USDA language in the will, but provide/explain for disposition of property should the beneficiary predecease the testator.
- b. Some estate plans may want to reverse the simultaneous death presumption in order to balance the value of the estates. Perhaps may want to have the “poorer” spouse or spouse that owns less assets to always survive the “wealthier” spouse to take advantage of tax saving devices.

6. DL Wills USDA provision:

**TWELFTH:** I direct that for purposes of this will a beneficiary shall be deemed to predecease me (or any other person upon whose death the interest of such beneficiary depends) unless such beneficiary survives me (or such other person) by more than thirty days..

## **VI. SGLI COUNSELING.**

A. Importance of SGLI in Legal Assistance.

B. What is SGLI?

1. Group term life insurance for members of the armed forces, purchased by the government from private insurers, and partially subsidized by the government.
2. How the SGLI Program Works.

C. Soldiers Covered.

1. Active Component.

- a. Active duty soldiers are automatically insured for \$250,000 unless they opt out in writing.
- b. Soldier can elect lower coverage or no coverage by completing VA Form SGLV-8286.

2. Reserve Component. Certain reservists are eligible for coverage.

D. Scope Of Coverage.

- 1. Insurability is guaranteed when first given the opportunity to elect SGLI. Thereafter, soldiers who desire to increase coverage may be subject to insurability determinations
- 2. Provides protection on active duty and for 120 days following separation. No premiums are required during this additional 120 day period. Soldier may convert to Veteran's Group Life Insurance (VGLI) within 120 days of separation.
- 3. Soldiers may lose entitlement to SGLI based on:
  - a. their duty status at time of death (e.g., if death occurs during extended AWOL or while serving term of confinement); or
  - b. other miscellaneous factors (e.g., following refusal to serve due to conscientious objector status or following conviction of certain serious crimes).
- 4. Cause of death, however, is not relevant to the payment of SGLI proceeds.

E. Eligible Beneficiaries.

1. Any person or legal entity designated by the soldier on appropriate VA form (Active Component: VA Form SGLV-8286). SGLI Act gives service member absolute right to choose beneficiary. Ridgway v. Ridgway, 454 U.S. 46 (1981).
2. If no designation, or "By Law" designation, then proceeds are paid according to SGLI statute:
  - a. All to spouse, but if none, then
  - b. All to surviving children in equal shares (and descendants of deceased children, by representation), but if none, then
  - c. All to parents (equally divided), but if none, then
  - d. All to executor of soldier's estate, but if none, then
  - e. Next of kin under state law.
3. Avoid "By-Law" designation. "By Law" designations are no longer authorized within the Army. See AR 27-3, para 3-6b(1) (10 Sep 95); AR 600-8-1 (20 Oct 94).
4. SGLI definition of "parents" for purposes of beneficiary designations. Pursuant to 38 U.S.C. §1965(9), the term "parent" is limited to the father/mother of a legitimate child, the father/mother of an adopted child, and mother of an illegitimate child. The father of an illegitimate child is considered the parent also, but only if
  - a. acknowledged in signed writing prior to death;
  - b. judicially decreed either to be the father or to provide support; or

- c. proof of paternity is established from official records (e.g., birth, school or welfare records) which show that, with his knowledge, claimant was named father.

See Lanier v. Traub, 934 F.2d 287 (11th Cir. 1991) (Despite fact service member raised by stepfather, "by law" designation precluded stepfather from sharing in SGLI proceeds, which went to natural father and mother).

- 5. SGLI definition of "children" for purposes of beneficiary designations. Pursuant to 38 U.S.C. § 1965(8) the definition of "child" is limited to a legitimate child or a legally adopted child. An illegitimate child is also included within the term if the insured is the child's mother or, if the insured is the father, the relationship meets the requirements of para. a.(1) through a.(3), above.

F. Currency of Designation.

- 1. Soldiers should be cautioned to keep their SGLI form updated. See Ridgway v. Ridgway, 454 U.S. 46 (1981) (A spouse was designated by name on SGLI election form. Soldier did not change election following subsequent divorce; ex-spouse was entitled to all the proceeds). See also Zawrotny v. Brewer, 978 F.2d 1204 (10th Cir. 1992), *cert. denied* 113 S.Ct. 1418 (1993). (Oklahoma statute stated that, by operation of law, divorce causes ex-spouse to lose all entitlement to life insurance proceeds on life of previous spouse. Court of Appeals held Oklahoma statute ineffective to change ex-spouse designation on SGLI form.).

G. Minors as Beneficiaries.

1. OSGLI will not pay to a minor (except a minor spouse).
2. Consider trustee (living or testamentary) or custodian under Uniform Gifts (Transfers) to Minors Act (UGMA/UTMA) as designated beneficiary for minor children. Such designation may avoid delay and expense in the payment of proceeds.
3. SGLI intended for minors may be designated by the soldier for placement in a trust; for placement in a custodianship under the Uniform Gifts or Uniform Transfers to Minors Act; or for outright gift (in which case a court must appoint a guardian or conservator to receive and maintain the proceeds). The following language is recommended for trust/custodianship SGLI beneficiary designations on the SGLV-8286 (Servicemen's Group Life Insurance Election and Certificate) (see AR 600-8-1, figures 11-12 to 11-14):

a. Testamentary Trust for Children:

- (1) "My trustee to fund a trust established for the benefit of my children under my will."
- (2) A soldier who wishes to designate a trustee under a trust established in a will (a testamentary trust) as a primary or contingent beneficiary will be advised that before completing the SGLV-8286, the soldier must have a will prepared that contains a trust, and the soldier must sign (execute) the will. The trust in the will may be established for minors or adults, regardless of their relationship, if any, to the soldier. The soldier will be further advised of the following--

(a) Advantages are--

- (i) The need and (related expense) of maintaining a surety bond may be waived in the will.



- (ii) The trustee can use the SGLI proceeds for the benefit of the minor for the period of time, and in the manner specified, in the will. Direct distribution of SGLI proceeds may be delayed beyond the 18th birthday of the minor (e.g., upon completion of college, or age 25, which ever occurs first).

(b) Disadvantages are--

- (i) The will, which might not have otherwise required probate (e.g., because of the small amount of other property in the soldier's estate), will have to be probated and the court will need to appoint the trustee before the designated trustee may receive the SGLI proceeds. Court and legal expenses will have to be paid.
- (ii) The distribution of SGLI proceeds will be delayed.
- (iii) There is no surety bond required that could protect the minor's funds from theft, fraud, waste, and other such acts by the trustee.

- b. The definition of "children" in the SGLI statute excludes stepchildren and certain illegitimate children. If any such children are intended beneficiaries, they should probably be included by name in the SGLI designation. For example, "... for the benefit of my children, including my stepchild, Mary Lamb, ...."

## VII. CLAUSES OF THE WILL.

### A. The Preamble.

1. Declare the proper state as testator's domicile. The declaration is evidence of domicile, but is not irrebuttable. Domicile is not necessarily where probate will occur but may be the substantive law that applies.

- a. Determining domicile or venue for probate.

- (1) Vote.

- (2) Driver's license & registration.

- (3) Own real property.

- (4) Pay taxes.

- (5) Membership in local organizations.

- b. Where most likely will probate occur (or be required)?

- c. Where best to probate?

2. Revoke all previous wills and codicils. In the absence of express revocation of prior wills and codicils, the new instrument revokes them only insofar as its provisions are inconsistent.

3. Insure client's name and social security number are accurate.

4. DL Wills Preamble:

**I, HOMER STAR**, a resident of the State of Florida, make, publish and declare this to be my Last Will and Testament, revoking all wills and codicils at any time heretofore made by me. I am in the military service of the United States, currently stationed at Fort TJAGSA, Virginia.

B. Selection of Personal Representatives and Trustees.

1. Select qualified, trustworthy, and competent fiduciaries.

a. Can select corporate or individual fiduciaries. Some factors to consider:

(1) Cost

(2) Security

(3) Permanence

(4) Investment experience and policy

(5) Conflicts of interest

b. Institutional Fiduciaries: Benefits are professional experience and perpetual nature of relationship. Drawbacks are sometimes higher commissions, impersonal, and complications relating to the size of the estate.

c. Individual Fiduciaries: The testator must exercise due care in selection. Must be intelligent, trustworthy, and have some business sense.

d. Compensation.

(1) Will fiduciaries be compensated?

(2) If fiduciaries will be compensated, will the testator require that they be paid pursuant to statutory commissions or other schemes?

- (3) Bequest in lieu of commissions.
  - (4) Bequest in addition to commissions.
  - (5) Bequest payable only upon executor qualifying (treated as a gift). Bequest payable upon completion of duties is compensation and taxable income.
- e. Consider whether to appoint co-fiduciaries or a single fiduciary.
- f. Consider waiving bond for individual fiduciaries.
- g. Consider whether nonresident fiduciary can serve.
  - (1) Some states prevent non-residents from being named executor. Some allow non-residents if they are related to the testator.
  - (2) Non-resident executors usually have to consent to jurisdiction or appoint a local contact for purposes of service of process.
  - (3) Can provide for a selection by nominated fiduciary in the will:

“In the event X does not qualify as executor of my estate due to his lack of residency in the state where this will is probated, then X shall have the power to nominate such executor.”

- 2. Always appoint alternate fiduciaries.
  - a. Always provide for alternate or successor fiduciary if possible or the court may choose. When testator designates co-fiduciaries and one fiduciary cannot serve, the will can designate that the survivor chooses successor co-fiduciary.

- b. When drafting fiduciaries, always consider all contingencies (death, incapacity, unwillingness to act, resignation, etc..).
- 3. Specify fiduciary's management powers.
  - a. Seventeen states and the District of Columbia have enacted statutes the same as or similar to section 3-715 of the Uniform Probate Code which grants to executors 27 stated powers except as otherwise restricted by the will (Alaska, Arizona, Florida, Hawaii, Idaho, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, and Utah).
  - b. Eight states (Arkansas, Connecticut, Georgia, Massachusetts, Nevada, North Carolina, Tennessee, and Virginia) have statutes granting a list of powers to executors and trustees that must be incorporated by reference in the governing instrument to be effective.
  - c. List out or spell out the powers the fiduciary will have since not all states have fiduciary powers enumerated in statute.
    - (1) Bind client to specific state statute for fiduciary power (as specifically indicated by DL Wills), or
    - (2) Delete the reference to specific state statutes (powers listed in the will control).
  - d. Does the testator want to restrict the fiduciary to certain types of investments?

“... I limit the assets in which my trustee may invest to obligations of the United States Government and/or accounts in institutions that are insured by the Federal Deposit Insurance Corporation (FDIC).”

C. Tax Apportionment.

1. Statutes in 22 states deal with the apportionment of estate taxes, usually apportioned by the amount.
2. Exercise great care in the drafting of tax apportionment clauses to insure that it is “clear and unambiguous” or susceptible to only one construction.
3. In the basic estate plan it is usually better to have estate tax apportioned among all who take, probate and nonprobate property, by the taxable amount they receive, and not have all taxes paid by residue (Be careful with specific bequests when testator wants recipient to receive exact amount or the property with no deduction.). In DL Wills must select out of a basic will by selecting the highest value of an estate (regardless of its actual value) in order to see all the options and reach the apportionment choice.
4. Having marital or charitable property, usually the residue, pay the tax can have drastic effects, and in some cases can more than double the effective tax rate.
5. Do not use boilerplate language in DL Wills without reading and understanding.

D. Expense Clauses.

1. Payment of debts, funeral, and administration expenses.
  - a. Generally, personal representative required to pay expenses as a matter of state law. If assets of the estate are insufficient, statute creates a priority among creditors:
    - (1) Administrative costs
    - (2) Funeral expenses

(3) Debts and taxes to Federal government

(4) Medical expenses of last illness

(5) State law claims

(6) Others

b. Claims against the estate must generally be filed within 4 months of notice to creditors.

c. Avoid requiring executor to pay "all just debts."

d. Grant executor the power to extend or renew indebtedness upon such terms and for such time as the executor deems appropriate.

E. Providing for Management of Minors' Property.

1. Outright bequests.

a. Property held by guardian until child reaches age of majority.

(1) Guardianships involve expense and inconvenience.

(2) Can be a very restrictive arrangement for investments, loans, and use of funds.

b. Absolute ownership and control of property passes to child at age 18 or 21.

2. Transfer under Uniform Gifts to Minors Act (UGMA) or the Uniform Transfers to Minors Act (UTMA).
  - a. What are "UGMA" and "UTMA?"
  - b. Most states permit testamentary transfers to custodians under UTMA and/or UGMA (as revised).
  - c. The guardian of the property does not have to be the other natural parent.
  - d. Potential Advantages.
    - (1) Avoids cumbersome restrictions found in guardianship arrangements.
    - (2) You (the Attorney) can understand UGMA/UTMA.
    - (3) "Uniform" laws mean uniform application - even with mobile clients like those we have in the military.
    - (4) UTMA allows transferor choice of law options and has clear conflicts of law provisions.
    - (5) Transferor may designate a nonresident to serve as custodian.
    - (6) Custodianship is not a separate taxable entity.
  - e. Potential Disadvantages (in comparison with trust options).
    - (1) One beneficiary per custodianship. Must split assets into shares for each child.
    - (2) Mandatory age of distribution to beneficiary - too early?



- (3) Less control and accountability than trusts.
  - (4) No protection against spendthrifts (only a potential problem if custodianship continues into majority).
- f. Practice pointer: Modification of DL wills guardian provision to create a guardian of the property:

“I appoint G to be the Guardian of the person and property of any children of mine who have not attained the age of majority, ***as I believe it to be in the best interests of my children. [Think about inserting other information, i.e., the children have bonded with G, my sister and have strong ties to her children; the children have never spent any time with their father, etc..]*** If G shall fail or cease to act as Guardian, I appoint G2 as Guardian. Said Guardian [may] ***shall*** act as Guardian of any property passing to my children ***[insert names of children from former relationship/marriage if this is a case where now remarried with children of present marriage]*** under this will even if my children at any time may be living with ***[their father]*** my former husband. No Guardian shall be required to file or furnish any bond, surety or other security in any jurisdiction. If my Trustee or any trust hereunder is the beneficiary of any life insurance policy, my Trustee shall be entitled to the insurance proceeds rather than my Guardian. ***[It is my direction that {insert name of father} have no control nor management of any assets passing to my children X and Y by reason of my death, whether or not passing under this will.]***”

- g. See Appendix F for sample clause to use if state does not recognize testamentary transfers under UGMA.

### 3. Testamentary trusts for children.

#### a. Elements.

- (1) Settlor, Creator, Grantor: the testator
- (2) Trustee: legal title; the money manager.
- (3) Beneficiary: equitable title; the recipient.
- (4) Corpus: the value of assets in trust.

- (5) Income.
  - (6) Duration: beware of the rule against perpetuities, use a saving clause, i.e., “any trust must terminate not later than 21 years after the death of the youngest beneficiary alive at my death.”
- b. Generally, for most “traditional families” the testamentary trusts for children are contingent trust or they come into being should the spouse predecease the testator.
  - c. However, a testamentary trust can be a “family trust” for the benefit of the spouse and children. This type of testamentary trust is commonly used for “mixed or blended families” in second marriages (or beyond) when children of the first marriage are to receive bequests in addition to the spouse or when it is necessary to have someone other than the spouse manage the assets.
  - d. Advantages.
    - (1) Court control over sales, investments, and accountings may be lessened or eliminated.
    - (2) Greater flexibility may be achieved in design of trust.
    - (3) Title to property vests in trustee. Transfers from trustee to 3d parties are not voidable.
    - (4) Testator controls age of distribution.

e. Types of trusts.

(1) Unitary or Sprinkling Trust (Pooled Asset).

- (a) One combined trust for several children. All assets held in one trust and drawn upon for the benefit of all children with no proportionate scheme required.
- (b) Terminates when the youngest child reaches age specified by testator.
- (c) Trustee acts as parent, distributing trust assets to beneficiary based on need.
- (d) Less costly to administer than single trusts.
- (e) Unitary trust has certain disadvantages:
  - (i) Children not treated equally.
  - (ii) Older child may receive nothing.

(2) Single trust ( or separate trust for each child).

- (a) Testator establishes one trust for each child.
- (b) Typically, every child takes equal share. Testator may, however, set up trusts in unequal amounts.
- (c) Trust(s) terminate upon age specified by testator.

(d) Single or separate trust has certain disadvantages:

- (i) Separate trust may be better suited to larger estates, where the share of each child will be enough to take care of possible expenses (tuition, medical, etc.).
- (ii) Cannot draw upon the share of one child to use for another child.
- (iii) Added expense for separate trust administration and accounting.

f. Trust terms.

- (1) Powers and duties of the trustee. May be incorporated by reference to state statute.
- (2) Spendthrift trust provisions.
  - (a) Most American jurisdictions permit a settlor to provide that any beneficial interest shall be free from anticipation or assignment and not be subject to claims of creditors.
  - (b) In minority of states that do not recognize spendthrift trusts, the settlor may provide that in the event of an assignment, or attempted assignment, the interest of the beneficiary is divested.
- (3) Rule against perpetuities. Include a savings clause requiring interests to vest within 21 years of a life in being.
- (4) Provide for terminating trust when administration becomes uneconomical.

- (5) Include a last resort clause specifying alternate beneficiaries.

F. Selection of Guardian for Minor Children.

1. Testator should always name guardians of the person for minor children.
2. Guardianships terminate at local age of majority (usually 18).
3. Law of guardianship varies from state to state. Many will be reluctant to designate a non-resident of the state as guardian.
4. Guardianship provisions are even useful if parents are divorced and one parent survives the testator. The will and guardianship provisions can set out the custodial parents reasons for not wanting the other parent to be the guardian (fitness). Although courts are not required to follow the testators wishes, the test that the court will follow will be the “best interest of the child.”

G. The Testimonium Clause.

1. Establishes that document is intended to be testator's last will.
2. Testator's signature should be at the logical conclusion of the will.
3. Include date will was signed.

H. Attestation Clause.

1. Comply with state statutory requirements.
2. Most states do not provide any specific form.
3. Several states (e.g., California, New York, and South Dakota) specify that witnesses should give their addresses.

I. Self-Proving Affidavit.

1. A self-proving affidavit establishes the authenticity of a will.
2. Ensure witnesses sign both the will and the self-proving affidavit.

**VIII. EXECUTION OF THE WILL.**

A. Will Execution Procedure (See Appendix E.)

1. Attorney must supervise entire execution ceremony in the Army under AR 27-3.
2. The attorney (draftsman) will include his name, rank, and state of admission are indicated on the document. AR 27-3, para. 3-6b(2). (The attorney may have to provide testimony in a will contest or construction proceeding.)
3. Testator should orally declare document to be last will and testament.
4. Testator should sign at the end of the will proper in front of all witnesses.
5. Execute one will (not copies) and do not permit alterations.
6. Do not ever remove staples or take apart will and re-assemble.

B. Witnesses.

1. Use at least two young, disinterested witnesses. The attorney drafting the will can be one of the witnesses.
2. Avoid mass will executions and having deploying soldiers serve as witnesses if at all possible.
3. All witnesses should sign the will and self-proving affidavit in presence of the testator and of each other in an attestation clause after the testator's signature.
4. Self-Proving Affidavits.
  - a. Only go to due execution.
  - b. They will not avoid a contest on the lack of testamentary capacity, undue influence or fraud.
  - c. In the event testimony of witnesses will be necessary, or will you find the military witnesses?

C. Debriefing Clients.

1. Advise the client where to safekeep the will. Make it very clear to the client not to keep the will with him.
2. Explain circumstances and situations where updating the will would be beneficial.

3. Explain how to revoke the will and caution about unintentional revocation.
  - a. Revocation by Operation of Law.
    - (1) Marriage.
    - (2) Divorce.
    - (3) Birth of child.
  - b. Intentional Revocation
    - (1) Destruction with intent to revoke.
    - (2) Revocation by subsequent will or document executed with same formality as will.
    - (3) The client may not always desire to destroy a previous will when executing a new one. Can be important to show intent or plan.
4. Explain the termination of the attorney-client relationship.
5. Explain that copies are not kept in the legal assistance office.
6. Allow only executed wills to leave your office and execute only one document.

## **IX. CONCLUSION.**



**APPENDIX A**  
**MORTUARY PLANNING SHEET**

TO THE NEXT OF KIN OF: \_\_\_\_\_

This is an expression of my preferences and desires regarding the disposition of my remains and other arrangements at the time of my death. I am writing this to make things easier for you and to make my thoughts known.

I feel it would be best if preparation, casketing and transportation were handled by :

\_\_\_ Next of kin working with local funeral home.

\_\_\_ The military authorities, through their contact with a local funeral home (applicable only if on active duty).

\_\_\_ Next of kin working with:

(Name and address of funeral home)

At the time of death, I prefer:

\_\_\_ Conventional Burial.

\_\_\_ Cremation.

\_\_\_ No preference.

\_\_\_ I would like to be in

\_\_\_\_\_ Uniform:

(Branch of Service)

My preference for a burial place or disposition of ashes is:

\_\_\_ Private Cemetery.

(Show name and  
location)

\_\_\_ National or other Gov't  
Cemetery, contingent on  
availability of space.  
(Show name and  
location)

\_\_\_ Burial at sea.

\_\_\_ Wherever you decide it would be easiest for you.

\_\_\_ Other:

In the event that my body should have to be shipped to another location, I prefer that the following funeral home be selected as "receiving" funeral home.

\_\_\_\_\_  
\_\_\_\_\_  
I desire the following religious services be conducted:

\_\_\_ Church services.

(Show name and  
location)

\_\_\_ Funeral home services.

\_\_\_ Memorial services.

\_\_\_ Graveside committal services.

\_\_\_ Other, please explain:

(More than one block may be marked)

Military honors desired if available from \_\_\_\_\_ resources.

(Service)

\_\_\_\_ Chaplain

(Service)

(Please indicate religious preference)

\_\_\_\_ Pallbearers.

\_\_\_\_ Bugler.

\_\_\_\_ Firing Party.

\_\_\_\_ Color Guard.

\_\_\_\_ Other, Please explain:

My preference concerning:

a. Government-furnished headstone or marker: \_\_\_\_ Yes \_\_\_\_ No

If preferred, type:

b. Clergy:

c. Flowers, memorials, agencies, contribution should be made to:

d. Favorite soloist or organist, psalms or other special requests:

e. Friends to notify:

OTHER DESIRES OR NOTES:

\_\_\_\_\_  
(SIGNATURE)

(DATE)

(A copy of this document should be given to your next of kin, executor and other close relative).



## APPENDIX B - ANATOMICAL GIFT BY A LIVING DONOR

I am at least 18 years of age and make this anatomical gift to take effect upon my death. The marks in the appropriate blanks and words filled into the blanks below indicate my desires.

1. I give: My body \_\_\_\_\_;  
Any needed organs or parts \_\_\_\_\_;  
The following organs or parts:

2. To the following person:

\_\_\_\_\_;

To any person, tissue bank, or institution authorized by law:

\_\_\_\_\_;

To the following named physician, hospital, tissue bank or other medical institution:

\_\_\_\_\_.

3. For the following purposes:  
Any purpose authorized by law: \_\_\_\_\_;  
Transplantation: \_\_\_\_\_;  
Therapy: \_\_\_\_\_;  
Medical research and education \_\_\_\_\_.

\_\_\_\_\_  
Signature of Donor

Address of Donor

Date:

Signed by the Donor in the presence of the following who sign as witnesses:

\_\_\_\_\_  
Signature of Witness

Address of Witness

\_\_\_\_\_  
Signature of Witness

Address of Witness



**APPENDIX C**  
**SAMPLE DUAL REPRESENTATION LETTER FOR EXISTING ESTATE PLANNING**  
**CLIENTS WITH SEPARATE FAMILIES**

Dear \_\_\_\_\_:

This letter is written to you in order to insure, as much as can be insured, the validity and objective independence of the advice, counseling, and planning that I have given or done for each of you through the years. I have, of course, represented each of you particularly in the planning of your respective estates, which planning provides for your respective separate families.

Matters to which such representation has extended, and likely will extend, include the following:

1. Analysis of your wills, codicils, trusts, and property agreements, if any.
2. Analysis of the assets owned by each of you, including consideration of their value and the nature in which title is or should be held, and the categorization of such assets as separate or community property.
3. Discussions about the manner in which you wish to dispose of such property.
4. Analysis of the tax impact of such disposition and recommendations relative thereto.
5. Preparation of the documents necessary to accomplish the desired disposition.

We have talked from time to time about differences that may arise between you with respect to the ownership of your property and its desired disposition, particularly in view of your respective separate families. Such differences, under our ethical rules, do not prevent me from continuing to represent both of you. Of course, if conflicts of interest arise, ordinarily one lawyer cannot represent both of you, and it might be preferable for each of you to have separate independent counsel to avoid the possibility that advice to one is influenced by representation of the other. Nevertheless, as you have in the past, you have again expressed your continued interest in having me represent both of you notwithstanding the foregoing explanation.

Although it is doubtful that it will happen, if conflicts do arise of such a nature that it is impossible for me to perform my obligations to each of you, I will withdraw from continued dual representation and advise one or both of you to obtain independent counsel. It is, of course, implicit in such dual representation that there will be a complete and free disclosure and exchange of all information that I receive from either one or both of you in the course of my representation of you, and that such information shall not be confidential between you irrespective of whether I obtain such information in conferences with both of you or in private conferences with only one of you.

Assuming that you are satisfied with my continued representation of each of you and both of you, please sign the enclosed copy of this letter and return it to me for our files. A previously addressed and postmarked envelope is enclosed for your convenience. Should you have any questions concerning this letter or my representation of either of you or both of you, please feel free to call me.

Sincerely,  
(Attorney's Signature Block)

I have read the foregoing letter, understand the same, consent to the disclosure and exchange of all information received by you from either one of us, with the other one of us, and consent to representing each and both of us in the aforementioned estate planning services.

Dated: \_\_\_\_\_, 19\_\_\_\_

(Signature of husband; typed name below) (Signature of wife; typed name below)

## **APPENDIX D**

### **WILL DRAFTING CHECKLIST**

#### **I. DATA ACCUMULATION.**

##### **A. Personal.**

1. Names, aliases, former names, social security numbers (SSN's).
2. Dates of birth (DOB).
3. Prior divorces - date, final verified.
4. Residence.
5. Domicile.
6. Citizenship/immigration status of parties.
7. Children: Names, DOB's, SSN's
  - a. Of this marriage.
  - b. Prior marriages.
  - c. Others expected.
8. Any antenuptial contract?
9. Any property declarations or transmutation agreements?
10. Any prior marital termination contract?
  - a. This marriage.
  - b. Prior marriages.
11. Occupations of parties and children.
12. Work histories.
13. Education levels.
14. Special needs/handicaps.
15. Community property?

##### **B. Insurance policies.**

1. Name of the insurer.
2. Policy number.
3. Policy owner.
4. Type.
5. Face value.
6. Transferable?
7. Beneficiary? SGLI & Death Gratuity "By Law" designations-is there a need to

revise them?

##### **C. Assets.**

1. Stocks, bonds, and notes.
  - a. Certificates? Street name?
  - b. Location of certificate/instrument.
  - c. Security perfected.
  - d. Valuation; date and method used.

- e. Income tax basis.
  - f. Form of title.
2. Tangible personal property.
- a. Automobile(s).
    - (1) Make, model, and year.
    - (2) Fair market value and method of valuation.
    - (3) Outstanding loan balance and monthly payment.
    - (4) Form of ownership.
  - b. Collectibles, furnishings, and appliances that client believes are significant.
    - (1) Describe.
    - (2) Value and method of valuation.
    - (3) Outstanding loan balances and monthly payments.
  - c. Miscellaneous items.
    - (1) Describe.
    - (2) Value and method of valuation.
    - (3) Outstanding loan balances and monthly payments.
3. Intangibles.
- a. Financial accounts.
    - (1) Type.
    - (2) Account number.
    - (3) Owner.
    - (4) Institution (name, address).
    - (5) Value.
  - b. Partnership Interests/Shelters.
    - (1) Income tax basis and date of acquisition.
    - (2) Expectancies and Non-vested Assets.
      - (a) Nature.
      - (b) Date contingency to be fulfilled.
      - (c) Controlled by whom?
4. Realty.
- a. Present occupant.
  - b. Popular description.
  - c. Legal description.
  - d. Title in whose name? Form?
  - e. Encumbrance?
    - (1) Who is creditor?



- (2) Type of security?
    - (3) Who is debtor?
    - (4) Perfected?
    - (5) Amount due? Payment rate?
    - (6) Any balloon?
    - (7) Interest rate? Fixed or Variable?
    - (8) Any unrecorded claims - i.e., amount owed to family?
    - (9) Valuation - method used.
  - f. If leased, length of lease - rental received/obligations of owner.
  - g. Basis for income tax purposes (depreciation, gain previously deferred).
- D. Debts and Claims.
- 1. General creditors.
    - a. Who are the creditors?
    - b. Type of debt (unsecured loan, revolving charge account, mortgage, etc.)
    - c. Reason for incurring the debt.
    - d. Encumbered property.
    - e. Who is obligated to pay?
  - 2. Estate Taxes.
    - a. Federal.
    - b. State.
  - 3. Death and Funeral Expenses.

## **II. FORMALITIES.**

- A. Testamentary capacity.
  - 1. Age.
  - 2. Competent.
  - 3. U.S. citizen.
- B. Revoke prior wills.
  - 1. Codicil.
  - 2. New will.
- C. Type of will.
  - 1. Holographic.
  - 2. Oral.
  - 3. Formal.
- D. Advice to testator.
  - 1. Liquidity problems.
  - 2. Probate avoidance vehicles.
  - 3. Coordinate beneficiary forms on life insurance.
  - 4. Ways to increase value of estate.

### **III. DRAFTING THE WILL.**

- A. Preamble.
  - 1. Identify testator(trix).
  - 2. Declare domicile.
  - 3. Military status.
  - 4. Revoke prior wills.
  - 5. Recitals (optional).
    - a. Spouse.
    - b. Children.
  
- B. Funeral/Burial Desires.
  - 1. Left in separate memorandum?
  - 2. Anatomical gifts.
  - 3. Living will.
  
- C. Specific bequests.
  - 1. Carefully described.
  - 2. Ademption problems?
  - 3. Insurance proceeds pass with property.
  - 4. Property subject to encumbrance.
  - 5. Real estate.
    - a. Ancillary probate.
    - b. Encumbered?
    - c. Freedom to distribute.
  - 6. Demonstrative bequests.
    - a. Ademption problems.
    - b. True intent of testator ascertained?
  - 7. General bequests.
  - 8. Conditional bequests.
    - a. Condition clearly spelled out.
    - b. Time for performance clear.
    - c. Not expressed as a mere wish.
  - 9. Charitable bequests.
    - a. Organization qualifies as charity.
    - b. Organization described carefully.
  - 10. Will testator leave a personal property letter?
    - a. Binding letter.
    - b. Incorporate by reference?
    - c. Referred to in will.

- D. Residuary Bequests.
  - 1. Primary beneficiary(ies).
  - 2. Alternate beneficiary(ies).
  - 3. Catchall beneficiary.
  - 4. Property to minors.
    - a. Alternatives to guardianship (custodian account/trust).
    - b. Per stirpes/per capita?
    - c. Benefit after-born.
- E. Testamentary Trusts.
  - 1. Type of trust.
    - a. Unitary.
    - b. Single trust.
  - 2. Purpose of trust.
  - 3. Name of trustee.
    - a. Specify alternate.
    - b. Powers.
    - c. Bond.
    - d. Compensation.
  - 4. Distribution.
    - a. Income.
    - b. Principal.
    - c. Age of distribution.
  - 5. Rule Against Perpetuities.
  - 6. Spendthrift trust clause.
  - 7. Bailout clause.
- F. Appointment of Fiduciaries
  - 1. Primary and alternates named.
  - 2. Bond waived.
  - 3. Corporate or individual.
  - 4. Single individual, not co-fiduciary.
  - 5. Ancillary probate required.
  - 6. Residence of fiduciary.
  - 7. Compensation.
  - 8. Powers.
    - a. Enumerated powers.
    - b. Incorporate state statutory powers.
- G. Administrative Clauses.
  - 1. Survivorship clause.

- a. Simultaneous death.
  - b. Survivorship period less than 6 months.
  - c. Specified in terms of hours.
- 2. Debts/apportionment clause.
  - a. Does will unnecessarily require testator to pay "all just debts"?
  - b. Clause give power to extend or renew?
  - c. Tax apportionment.
    - (1) Apportioned among all beneficiaries.
    - (2) Paid for out of residuary.
  - d. Abatement problems considered?
- 3. No contest (in terrorem) clauses.
- 4. Disinheritance of relative.
  - a. Omit reasons for disinheriting.
  - b. Specifically disinherit relative by name.
- 5. Severability Clause.
- 6. Veteran's benefits clause.

#### H. Definitions.

- 1. Per Stirpes (or per capita).
- 2. Children.
  - a. Stepchildren.
  - b. Adopted.
  - c. After-born.
- 3. Issue.
- 4. Terms such as personal property and household goods.

#### I. Attestation, Exordium, and Self-Proving.

- 1. Contains signature for testator and witnesses.
- 2. Place for date.
- 3. Self-proving affidavit included for state domicile.

### IV. WILL EXECUTION.

- A. Supervised by attorney.
- B. Witnesses.
  - 1. At least 2 adults; 3 if required by jurisdiction controlling execution of the Will.
  - 2. Disinterested.
  - 3. Initial pages.
  - 4. Sign will and self-proving affidavit.
  - 5. Testator.
  - 6. Declare document is will.

7. Sign will.
8. Sign self-proving affidavit.

C. Procedure.

1. Follow SOP.
2. Witnesses sign in front of each other and testator.
3. Execute only one will.
4. Don't remove staples.

**V. TERMINATING RELATIONSHIP.**

A. Advice to client.

1. Need to revise will.
2. Where to keep will.
3. How to revoke will.

B. Terminate attorney-client relationship.

**APPENDIX E**  
**STANDARD OPERATING PROCEDURE FOR EXECUTING WILL**

The following, or a procedure covering substantially the same points, is recommended as standard operating procedure with respect to the execution of wills:

- a. If the will consists of more than one page, the pages should be fastened together securely. The will should specify the exact number of pages of which it consists. This page numbering should not include the self-proving affidavit, which is not part of the will.
- b. The testator should read the will in its entirety and the legal assistance attorney should ensure that the testator understands the terms of the will.
- c. The testator and two persons who have no interest, vested or contingent, in the property disposed of by the testator's will or in the testator's estate in the event of intestacy, along with the legal assistance attorney supervising the execution of the will, should be in a room from which everyone else is excluded, and should remain therein until the execution is completed.
- d. The legal assistance attorney supervising the execution of the will should ask the testator the following question: "Do you (state the name of the testator) declare in the presence of (name the witnesses) that the document before you is your will, that you have read the document, that you understand the document, and that the document expresses your desires as to the disposition of the property referred to therein upon your death?" The testator should answer "yes" and the answer should be audible to the two mentioned witnesses. The legal assistance attorney should also ask if the testator is executing the document voluntarily, without any duress or coercion. The testator should again make an audible "yes" response.
- e. The testator should initial or sign on the margin of each page of the will. This is done for purpose of identification and to prevent the subsequent substitution of pages. The testator should then sign his or her name at the end of the will. The three witnesses should be standing or sitting so that all can see the testator sign.
- f. The legal assistance attorney supervising the execution of the will should then ask the testator the following question: "Do you request (names of witnesses) to witness the signing of your will?" Again the testator should answer "yes", and the answer should be audible to the three mentioned witnesses.
- g. The legal assistance attorney should ask the witnesses if the testator appears to be of sound mind, to understand the nature of his or her actions, and to be under no duress or coercion.
- h. One of the witnesses should then read aloud the attestation clause.

- i. Each witness should declare that the attestation clause is a correct statement.
- j. Each witness should then sign his or her name in the place provided for the signatures of the witnesses following the attestation clause. As each witness signs, the testator and the other two witnesses should be so placed that each one can see the witness sign. The witness should place his or her full address and social security number opposite the signature. If the witness is in the military service, grade should also be included opposite the signature.

**APPENDIX F**  
**CLAUSE FOR INCORPORATING UNIFORM**  
**TRANSFERS TO MINORS ACT**

"If any beneficiary entitled to receive distribution of property (under this will) (from this trust) is a minor at the time of distribution, I direct that my (personal representative) (trustee) deliver the property to a custodian for the beneficiary under the Uniform Transfers to Minors Act, Uniform Gifts to Minors Act, or a similar custodian law of the State of \_\_\_\_\_ or any state in which the beneficiary may then reside; and I give to my (personal representative) (trustee) the power to designate any adult person or trust company, including my (personal representative) (trustee), custodian for the property distributed to each beneficiary under such law.

"If the law of the designated state does not provide for custodianship created in this manner, the distribution shall be made to the custodian as trustee for the minor and the terms of the trust shall be the Uniform Transfers to Minor Act as promulgated by the National Conference of Commissions on Uniform State laws, with the trust to terminate when the minor is twenty-one years of age.





## **CHAPTER Q**

### **LEGAL ASSISTANCE TECHNOLOGY & RESOURCES**

*(Outlines will be distributed during class.)*



**CHAPTER R**  
**SOLDIER READINESS PROCESSING**

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# **SOLDIER READINESS PROCESSING**

## ***OUTLINE OF INSTRUCTION***

### **I. INTRODUCTION**

### **II. REFERENCES**

- A. AR 600-8-101, Personnel Processing (In- and Out- and Mobilization Processing), 1 March 1997
- B. AR 27-3, The Army Legal Assistance Program, 21 February 1996.
- C. AR 27-1, Judge Advocate Legal Services, 3 February 1995.
- D. TJAGSA Pub JA 272, Legal Assistance Deployment Guide, February 1994.

### **III. OBJECTIVES**

- A. Familiarize students with Soldier Readiness Processing (SRP) program requirements.
- B. Inform students of regulatory requirements and practical solutions to legal issues arising in the SRP context.
- C. Identify issues, policies, and practical solutions to legal assistance services provided in the SRP environment.

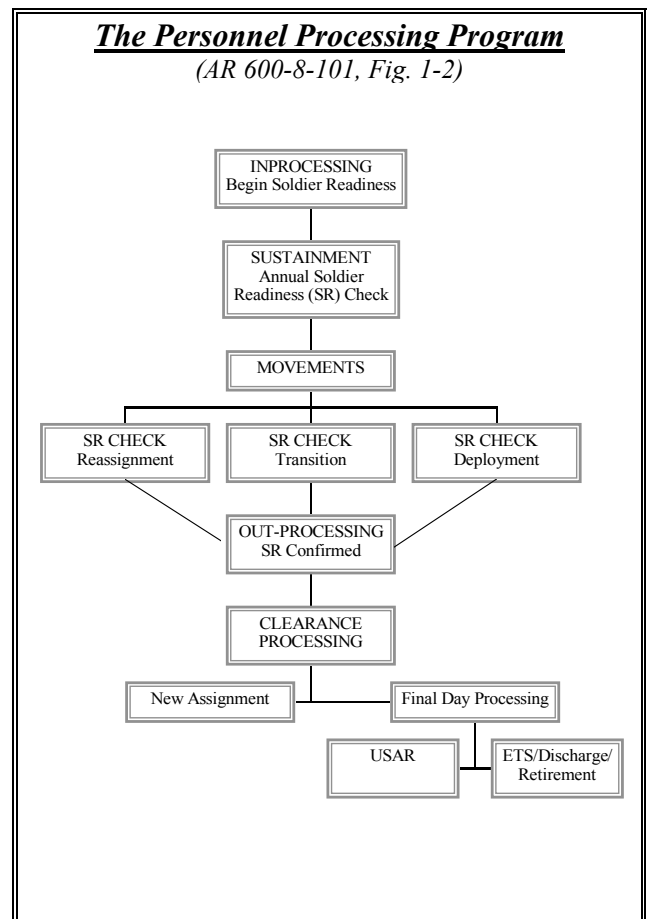
### **IV. SOLDIER READINESS PROCESSING (SRP)**

- A. What is it?
  - 1. Replaces the Preparation of Replacements for Overseas Movement (POR).

2. SRP “prepares, validates, and reports, individual soldier and unit readiness for deployment, including shortfalls, to the unit commander.” AR 600-8-101, para. 1-7.
3. The foundation of the program is that “all soldiers will be administratively ready for deployment at all times.” AR 600-8-101, para. 4-1a. To accomplish this, the program “[i]ncorporates planned checks on the soldier readiness status of the individual soldier.” AR 600-8-101, para. 4-1c.

B. Overview of the Personnel Processing Program

1. Soldier readiness is integrated into all parts of personnel processing.
2. HQDA sets specific administrative requirements that are checked and updated throughout the process.
3. At a minimum, these requirements must be checked: (AR 600-8-101, para. 4-2b)
  - a. Annually
  - b. During out-processing
  - c. Within 30 days of deployment
  - d. Within 30 days of departure on extended TDY (90 Days or more).



C. Soldier Readiness Requirements (Extract). See AR 600-8-101, paras. 4-3 - 4-7 for detailed processing requirements.

1. Level 1: Basic Movement Requirements

a. Personnel

- (1) Soldiers requiring a Family Care Plan (DA Form 5304-R) must have an approved plan on file.
- (2) SGLI Form reviewed/revised
- (3) DD Form 93 reviewed/revised
- (4) Each soldier will wear two ID tags around their neck at all times.
- (5) Each will soldier will carry a current ID Card (DD Form 2A) at all times.

b. Medical

- (1) Soldiers deploying OCONUS for more than 179 days must have a negative HIV test within 6 months of departure.
- (2) Soldiers deploying for less than 179 days must have a negative HIV test within 24 months of departure.

c. Dental. Soldiers must have a complete record to include a panoramic X-ray.

2. Level 2: Wartime Movement Stopper Requirements

a. Personnel

- (1) Soldiers will not be sent to countries where they have been held as POWs.

- (2) Unless waived by the soldier, sole surviving family members will not be sent to an area where duties would normally involve actual combat with the enemy.
- (3) Soldiers with a 3 or 4 physical profile will not deploy (unless declared deployable by an MMRB).

b. Medical

- (1) Pregnant soldiers will not deploy.
- (2) Soldiers without current immunizations will not deploy.
- (3) Soldiers requiring eyeglasses will have two pair plus NBC inserts to deploy.

c. **Legal Affairs.** Soldiers must have received a Geneva Convention briefing at some point in their current enlistment/career.

d. **Security Clearance.** Soldiers must meet security clearance requirements for their position and for the area they are deploying to.

e. **Training.** Soldiers must have qualified with their individual weapon within the 12 months prior to deployment.

3. Level 3: Other Requirements.

a. Personnel

- (1) Commanders may restrict soldiers pending discharge, separation, compassionate reassignment, etc. from deployment.
- (2) Soldiers who have been approved for 1-A-O Conscientious Objector status will not be deployed to an area where their normal duties would require the handling of weapons.



b. Medical

- (1) Soldiers receive medical history screening.
- (2) Soldiers queried for exceptional family member program.

c. Dental

- (1) Soldiers with dental classification 3 or 4 will not deploy until treatment is complete.
- (2) Each soldier will have a duplicate panoramic x-ray on file at the Central Panoramic Storage Facility.

d. **Legal Affairs**

- (1) Soldiers pending civil felony charges will be provided assistance. The soldier may not be deployable because of the charges.
- (2) *Given time and other resources*, POA support may be provided.
- (3) *Given time and other resources*, Will support may be provided.
- (4) Soldiers will be counseled on insurance and other civil matters.

4. Level 4: Deployment Area/Mission Unique Requirements.

- a. Personnel. Soldiers will be processed for a passport if required.
- b. Medical. Soldiers will receive appropriate immunizations for the area.

c. **Legal Affairs.** Soldiers will be briefed on the applicable local laws for the deployment area.

d. Training.

(1) Soldiers will receive a terrorist briefing before deploying.

(2) Family members will receive an unclassified briefing about the soldier's deployment mission and area.

5. Level 5: Peacetime PCS/Transition Requirements. *See* AR 600-8-101, para. 4-7.

D. Readiness Requirements for Movement:

1. Annual Check: Not specified in the regulation. Common sense dictates checking Levels 1-3.

2. Contingency Operations: Commanders physically review on-site, within 30 days of departure, processing requirements in Levels 1-4.

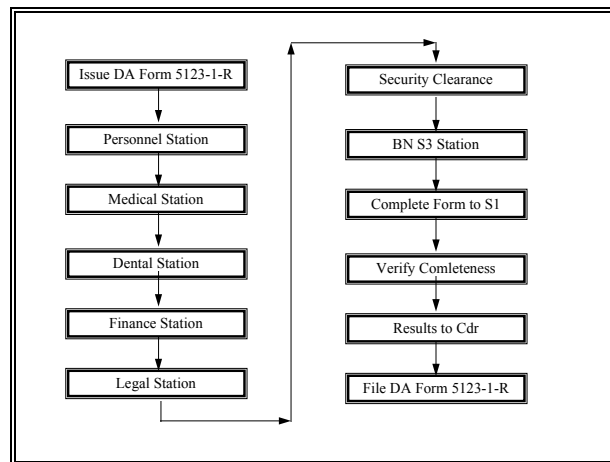
3. Administrative Movement: Prior to actual movement during peacetime, commanders will review the processing requirements in Level 1.

## **V. LEGAL READINESS PROCESSING**

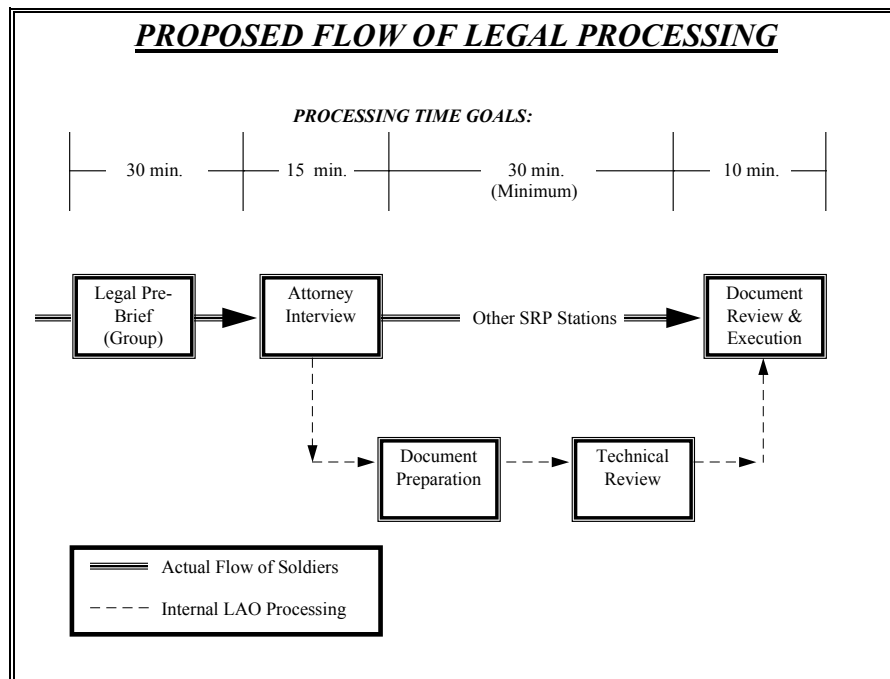
### **A. Who Gets It? AR 27-3, para. 2-5.**

1. Active component soldiers and their families.
2. Reserve Component soldiers and their families (but supervising attorneys may limit assistance based upon availability of expertise or resources).
3. DoD Civilians who are:
  - a. Designated “mission-essential” or “emergency -essential.”
    - (1) Only for those matters related to deployment.
    - (2) Family members may receive assistance on deployment-related matters, but only while the employee is deployed.
  - b. Not “mission-essential” or “emergency-essential,” but who deploy to a combat zone or on a contingency operation.
    - (1) Only for matters related to their imminent or actual deployment.
    - (2) Family members may receive assistance on deployment-related matters, but only while the employee is deployed.

B. Flow of SRP Processing. AR 600-8-101, table 5-1.



C. Proposed Flow



D. Practical Considerations

1. Place Legal Station Near the Beginning of the Processing Area (AR 27-3, para. 3-6b(1)(b)). Consider “two-station” approach.
  - a. May face resistance - different than the regulation.

- b. Allows time for document preparation
    - c. Allows legal advice to precede SGLI elections.
  - 2. Develop a Standard Legal Checklist
    - a. DA Form 5123-1-R does not include any legal processing steps.
    - b. See Appendix A for a sample legal checklist.
  - 3. Get Involved as OIC or Deputy SJA – influencing G-Staff needed.
  - 4. Demand an SOP from your LAO.
  - 5. Prior Planning Prevents Poor Performance
- E. Professional Responsibility Considerations
  - 1. The same legal and professional standards that apply in an Army legal office apply during SRPs. *See* AR 27-3, para. 3-6b(2)(a).
  - 2. LAAWS-LA. AR 27-3, para. 4-4.
    - a. LAAWS-LA represents Army policy for the appropriate format for legal assistance documents, records, and reports.
    - b. REMEMBER, it is ONLY a guide and NOT a substitute for the attorney's professional judgment and advice.
    - c. Factors, such as the unavailability of updated LAAWS programs or compatible equipment, the availability of suitable alternatives, or military or client needs or requirements may warrant the use of computer software programs other than LAAWS.

3. Attorney-Client Privilege/Confidentiality. AR 27-3, para. 4-8.
  - a. Protections and standards are NOT automatically waived!
  - b. You must make room at the SRP for confidential counseling.
4. Conflicts of Interest. AR 27-3, para. 4-9.
  - a. Supervising attorneys are responsible for ensuring procedures are in place to ensure that:
    - (1) Clients are screened to avoid inadvertent conflicts
    - (2) Full explanations are given to clients who cannot be assisted in an Army legal office because of a conflict.
    - (3) Clients who cannot be assisted are referred in accordance with AR 27-3.
    - (4) Confidentiality is maintained.
  - b. These procedures must be in place for SRP as well.
  - c. This affects the amount of clerical support/work stations that will be needed. PLAN for it!!!
5. Competence
  - a. Have a plan to “backup” your LAO.
  - b. Training is key – when did your trial counsel last think about estate planning? Taxes? Powers of Attorney?

## **VI. SELECTED LEGAL SERVICES**

### **A. Wills & Estates. AR 27-3, para. 3-6b.**

1. GENERAL RULE: Any eligible client who wants a will, gets one.
2. When legal resources are limited, priority is given to clients to which ANY of the following apply:
  - a. Those with minor children;
  - b. Those whose primary beneficiary is a minor;
  - c. Those with a net estate valued at more than \$10,000; OR
  - d. Those desiring to distribute their property in a manner different than what would occur under the applicable intestacy statute or existing will.
3. Drafting and execution of wills for others may be delayed until resources are available.
4. The execution of pre-printed fill-in-the-blank wills is limited to clients domiciled in states that specifically authorize the execution of such wills.
5. The same legal and professional standards that apply to will-drafting in the office apply at the SRP.

### **B. Powers of Attorney**

1. Preamble to all Powers of Attorney:

This is a MILITARY POWER OF ATTORNEY prepared pursuant to Title 10, United States Code, Section 1044b and executed by a person authorized to receive legal assistance from the military services. Federal law exempts this power of attorney from any

requirement of form, substance, formality, or recording that is prescribed for powers of attorney under the laws of a state, the District of Columbia, or a territory, commonwealth, or possession of the United States. Federal law specifies that this power of attorney shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the jurisdiction where it is presented.

2. General Powers of Attorney. AR 27-3, Par. 3-7e(2).

- a. NEVER advisable if a specific power will accomplish the desired purpose.
- b. A client requesting a general power of attorney for use by someone other than a trusted spouse or relative must be warned about the serious legal problems that can arise from its misuse.

C. SGLI/Insurance Counseling

1. EVERY client obtaining a will MUST be given advice on designating beneficiaries under SGLI (or other insurance). Advice on SGLI designation of beneficiaries will be available to ALL soldiers in the SRP.
2. Army policy is that soldiers will NOT use “by-law,” “by-will,” or “to-my-estate” designations on SGLI forms. AR 600-8-1, para. 11-29b. Instead, soldiers must designate beneficiaries BY NAME. *Id.* Attorneys will not recommend “by-law” type designations to any client regardless of service component
3. Practical Tips
  - a. Watch for “war exclusion” clauses on private insurance.
  - b. Avoid the estate beneficiary or “by will” - creditor access.
  - c. Encourage testamentary trusts with SGLI funding for minor beneficiaries to avoid court-appointed guardianships.



- (1) Consider the laws of the domicile and advise client if a trust will cause the will to be probated when it otherwise would not have been.
- (2) Inter vivos trusts may be prepared with approval of a supervisory attorney.

D. Other areas to plan for.

1. Living wills and durable POAs for health care
2. Tax problems/assistance.
3. Family Care Plans
4. Employment Concerns (Reserves)
5. SSCRA Protections

**VII. PREVENTIVE LAW MEASURES - STOP PROBLEMS BEFORE THEY START. AR 27-3, PARA. 3-3 - 3-4; AFI 51-504, CHAPTER 3.**

- A. Supervising Attorneys should be aggressive and innovative in disseminating information.
- B. Preventive law is a COMMANDER's program. AR 27-3, para. 1-4f(3).
  1. Use this to gain access to soldiers.
  2. Use this to justify requests for supplies and equipment. *See* AR 27-1, para. 9-3a.
- C. Use all media and training and education programs possible to inform soldiers and their families about: (AR 27-3, para. 3-4b.)

1. Their legal rights and entitlements.
2. Timely legal issues and local legal problems and solutions.
3. Thinking about the legal consequences of their actions before signing documents.
4. Getting legal advice as soon as they recognize a potential problem.
5. The location of the legal assistance office and how to contact it.

D. Practical Suggestions

1. Service Members
  - a. Coordinate with commanders to “volunteer” for routine (weekly/monthly) training. (Payday, OPD/NCOPD, etc.)
  - b. Participate in routine SRPs to reduce load at deployment. *See AR 27-3, para. 2-1b.(1) (“Readiness. Because Active Army and RC soldiers and emergency-essential DoD civilian employees must be prepared for immediate mobilization and deployment, their personal legal affairs must be in order at all times.”)*
  - c. Bulletin Boards in Unit Areas.
  - d. Post-Access channel
  - e. Newspaper/Newsletter Pubs.
2. Using the Internet
  - a. Much material is now readily available for download and use.

- b. Post/SJA Web Page
- 3. Family Members
  - a. Be involved with and volunteer to brief the Family Support Group (FSG).
  - b. Support the Army's new Army Family Team Building (AFTB) training.



**CHAPTER S**  
**THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT**  
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# **THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT**

## **OUTLINE**

### **I. INTRODUCTION.**

#### **A. SSCRA Applies to reserve and active components of all services**

1. SSCRA is important in both preventive law and client services context.
  - a) Army: AR 27-3, The Army Legal Assistance Program, (10 Sep 95), paras. 3-4 and 3-6.
  - b) Air Force: AFI 51-504, Legal Assistance, Notary, and Preventive Law Programs (1 May 1996), paras. 1.3.1 and 3.2.2.
  - c) Navy and Marine Corps: JAGMAN, Chap. VII, and JAGINST 5801.1, Legal Checkup Program.
2. CAVEAT: The SSCRA contains provisions such as life insurance guarantees (Article IV) and provisions regarding public lands (Article VI). These protections are beyond the scope of this outline. [This outline is keyed to the current SSCRA statute sections at 50 U.S.C. App. §500 et. seq., rather than to the sections of the original SSCRA.]
3. Best Sources of SSCRA Guidance: JAGCNET, and JA 260, SSCRA Guide (July, 2000).
4. SSCRA 1991 Amendments.

- a) Future Financial Arrangements - added 50 U.S.C. App. § 518. Future Protection for Persons using the SSCRA. The fact that a person has availed himself of protection under the Act may not be reported as adverse information against him and used to deny him credit in future financial arrangements. CAVEAT: This "safe-harbor" does not prevent an institution from reporting a failure to comply with an underlying obligation.
- b) Added U.S. Air Force and Reserve Component coverage explicitly to the Act.
- c) Durable Powers of Attorney for MIA's. All POA's for military are deemed durable for the entire period of imprisonment for POW's notwithstanding expiration dates contained in the document itself.
- d) Added 50 U.S.C. App. § 592 - Professional Liability Insurance for Certain Persons Ordered to Active Duty in the Armed Forces.
  - (1) Applies to health care professionals or other persons as determined by the Secretary of Defense [Has been extended for some contingencies to those providing legal services—DoD memorandum, March 1999].
  - (2) Who had liability coverage in force before coming on active duty.
  - (3) Allows for suspension of policy while on active duty, refund of premiums attributable to active duty time and guarantees reinstatement of insurance at termination of active duty.
- e) Added 50 U.S.C. App. § 593 - Reinstatement of Health Insurance Coverage upon release from Service.



## II. ARTICLE I - GENERAL PROVISIONS OF THE SSCRA.

- A. Purpose: The Purpose of the Act is to postpone or suspend some of the civil obligations of military personnel to allow them to give full attention to their military duties. The Act should be read "with an eye friendly to those who dropped their affairs to answer their country's call." *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).
- B. Constitutionality: The SSCRA is constitutional. Although it arguably interferes with the administration of justice within the states, courts have found that this interference is permissible as an exercise of Congress' power to raise and support the military forces under Article I, § 8 of the Constitution. *See, e.g., Radding v. Ninth Federal Savings & Loan Assoc.*, 55 F. Supp. 361 (D.C. N.Y. 1944).
- C. Protected Persons .
  - 1. Active Duty.
  - 2. Reserves while in active federal service.
    - a) Annual Training - applicable due to language of the Act - The term "person in the military service" includes "... federal service on active duty with any branch of service heretofore referred to... (§ 511) "... and any member of a reserve component of the Armed Forces who is ordered to report for military service shall be entitled to such relief and benefits...." (§ 516).
    - b) *In re Brazas*, 662 N.E.2d 559 (Ill. 1996). Appellate court holds that trial court abused its discretion by holding a hearing on divorce case issue when judge and opposing counsel were aware defendant on Reserve Active Duty for Training (ADT) status. *See also United States v. Stephan*, 490 F.Supp. 323, 325 (W.D. Mich. 1980).
  - 3. National Guard - Only if in active federal service.

- a) DAJA-AL 1991/1884 21 June 1991 - State national guard personnel on full-time state duty are not covered by SSCRA.
  - b) Research Tip - Do not overlook state protections such as LA Rev. Stat 29: §§ 401-425, and PA. Code Vol. 51, PA-C.S.A. §§ 7309-7316 (1990) which provide similar relief to military persons in state service.
- 4. Dependents - For Article III protections - protection available in their own right (other protections may be derivative).
  - 5. Others - sureties, guarantors, etc. - 50 U.S.C. App. § 513.

D. Period of Coverage.

- 1. Commencement.
  - a) Active Duty - date of entry.
  - b) Inductees - date of receipt of orders.
  - c) Reserve Components - date of receipt of orders for Articles I-III, date of reporting for all other protections.
- 2. Termination.
  - a) Ordinary - Date of discharge terminates some coverage. Some protections extend for a limited time beyond discharge but are tied to discharge date.
  - b) Misconduct.
    - (1) Court-Martial - Soldier serving sentence for violent assault has divested himself or herself of protections of the Act. Mantz v. Mantz, 69 N.E. 2d 637 (Ohio C.P. 1946).

(2) AWOL - Depends on reasons for AWOL.

(a) Soldier who "extended furlough" to attend birth of child still entitled to protection. *Shayne v. Burke*, 27 So.2d 751 (Fla. 1946).

(b) Soldier AWOL with whereabouts unknown not entitled to SSCRA protection. *Harriott v. Harriott*, 511 A.2d 1264 (N.J. 1986), and *U.S. v. Hampshire*, 95 F.3d 999 (10th Cir. 1996), *related case*, *Marriage of Hampshire*, 934 P.2d 58 (Kan. 1997).

(c) Self-inflicted injury. Marine who was hospitalized as a result of a self-inflicted gunshot wound not entitled to use SSCRA to stay judicial proceedings. *Burbach v. Burbach*, 651 N.E.2d 1158 (Ind.App., 1995).

c) Waiver.

(1) Written [50 U.S.C. App. Section 517].

(2) Executed after effective date of coverage.

(3) Specific - Waiver of one provision does not waive others. *See Harris v. Stem*, 30 So.2d 889 (LA Ct. App. 1947). Court held that waiver of rights against seizure of property did not affect tolling of statute of limitations.

3. Jurisdiction .

a) Applies in all courts in United States.

- b) Collateral Review of State decisions in Federal Court? - NO - *Shatswell v. Shatswell*, 758 F. Supp 662 (D. Kan. 1991). *See also* *Scheidegg v. United States*, 715 F. Supp. 11 (D. N.H. 1989)(SSCRA is not a grant of subject matter jurisdiction to seek review of state court decisions in federal court).
  
- c) Private Cause of Action ? - Generally no independent cause of action for SSCRA.
  - (1) *United States v. Bomar*, 8 F. 3d 226 (5th Cir. 1993). United States Attorney pursued criminal sanction for violation of Act.
  
  - (2) U.S. Department of Justice Memorandum to Department of Defense General Counsel on SSCRA Representation, 12 March 1991 (unpublished).
  
  - (3) *McMurtry v. City of Largo*, 837 F. Supp. 1155 (M.D. Fla. 1993). No federal cause of action for federal jurisdiction. Soldier's failure to use remedy under SSCRA does not permit later cause of action to retrieve the lost remedy.
  
  - (4) Use the remedy of the SSCRA in the applicable action or combine it with other causes of action as an equitable argument. *Garramone v. Romo, et. al.*, 94 F.3d 1446 (10th Cir. 1996) (Plaintiff may assert SSCRA rights as part of a civil rights action under 42 U.S.C. Section 1983.)
  
- d) Private Cause of Action for 6% Interest Cap Cases- SSCRA? Yes!!

- (1) Moll v. Ford Consumer Finance Company, Inc., 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. 1998) (unpub). A district court has held that the 1991 Amendments to the SSCRA [§518(2)(B)] create a private cause of action for recouping interest charged above the 6 % interest cap [§526]. Cathey v. First Republic Bank, 2001 U.S. Dist. LEXIS 13150 (2001)
- (2) See Conrad, Note, "Federal Court Rules That Military Members Have a Private Cause of Action Under the Soldiers' and Sailors' Civil Relief Act", The Army Lawyer, July 1998, at 63.

### **III. ARTICLE II - GENERAL RELIEF (50 U.S.C. APP. §§ 520-527).**

- A. Key Concept - Material affect requires a showing that the service member's military service has materially affected the service member's ability to fulfill the civil obligation.
- B. 6% Interest Cap (50 U.S.C. App. § 526).
  1. Limits interest to 6% for duration of military service. Limit applies to any personal obligation of the servicemember, even if it is also a corporate obligation. *See* Cathey v. First Republic Bank, 2001 U.S. Dist. LEXIS 13150 (2001)
  2. Criteria.
    - a) Applies only to obligations incurred before entry onto active duty.
    - b) Service member now on active duty, and,

- c) Military service materially affects ability to pay. Fed. Home Loan Mortgage Corp. v. Sincaban (unpublished) (U.S. Dist. Ct. W. D. WI. Order # 93-C-0090-C 13 Dec 93). Reserve doctor called to AD with reduced income. Creditor Bank discovered she had substantial investment income in millions - HELD - no material affect. Judge indicates that creditors may look at “totality of circumstances” to determine material affect, including spouse’s income, and accumulated assets.
  - d) Effective at entry on active duty/notice of activation.
- 3. Notice to lender. [Sample Letter to Lender at Appendix A.]
  - e) With copy of orders.
  - f) Burden. On lender to seek relief in court if lender asserts no material affect
- C. Issue of how to implement 6% reduction.
  - 1. Various asserted methods.
    - a) Forgive all interest above 6% (DOD/DOJ position).
    - b) Reduce rate but not payment. [This ploy was discouraged by the Comptroller of the Currency. See Advisory Memo, 1991 OCC CB LEXIS 13 (1991).]
    - c) Add interest above 6% to loan balance.
  - 2. DOD/DOJ position adopted during Desert Shield/Storm by national lending associations. [Joint Hearing before the House and Senate Veteran Affairs Committees on SSCRA, 101st Cong., 2d Sess. (12 Sep. 1990), *as reported in* The Army Lawyer, p. 50, Nov. 1990.]

3. SSCRA does not apply to federally guaranteed student loans (according to DOE interpretation).
    - a) Title 20, U.S. Code Section 1078(d). (Federally insured student loans are not subject to any interest rate limits.) Memorandum, Department of Education (DOE), to the Office of the Staff Judge Advocate, Camp Lejune, North Carolina (1 April 1993); U.S. Department of Education "Dear Colleague Letter", GEN-01-13 (September 2001) Lenders are to liberally grant forbearances to students, but DOL interpretation that SSCRA does not apply to student Military deferments are no longer granted for student loans but soldiers may have loan payments deferred for up to six months or more for economic hardship upon request to lender/DOE IAW 34 C.F.R. § 682.211.
  4. *See also* United States ex. rel. Bennett v. American Home Mortgage, (D. N.J.) (unpublished) (settled out of court after U.S. Attorney initiated suit on behalf of service member against lender that refused to lower payment).
  5. Responses to Creditor Refusal to honor 6% interest provision. Pottorff, James P., "*Contemporary Applications of the Soldiers' and Sailors' Civil Relief Act*," 132 MIL. L. REV. 115 (1991).
  6. Moll v. Ford Consumer Finance Company, Inc., 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. 1998) (unpub.). Military members may file private cause of action to enforce the 6% interest cap provision of 50 U.S.C. App. § 526.
- D. Stay of Proceedings (50 U.S.C. app. § 521).
1. Who.
    - a) Both military plaintiff and defendant may request.
    - b) But not plaintiff's attorney if the attorney is the person called to active duty. Salazar v. Rahman, 1993 WL 22085 (Tex. Ct. App. 1993)(unpublished).

- c) And not if a service member is a material witness - not a party. *Ohio v. Gall*, 1992 WL 217999 (Ohio Ct. App. 1992)(unpublished).
- d) Some courts allow use of stay provisions against a career soldier to bring action after expiration of statute of limitations. *Vincent v. Longwater*, (Georgia Ct. App. 2000, 2000 Ga. App. LEXIS 1001)

2. What Proceedings.

- a) Civil Court Hearings.
- b) Bankruptcy Debtor/ Creditor Meeting ?- Yes - In re *Ladner*, 156 B.R. 664 (Bankr. D. Colo., 1993).
- c) Administrative Hearing? No. ISSUE: The new Welfare Reform Act of 1996, Pub. L. No. 104-193, §§ 325,363, 110 Stat. 2105 (1996), requires states to set up administrative proceedings to expedite handling of child support and paternity claims which are not subject to SSCRA stay protection. Drafters ignored DoD request to include SSCRA stay protections for such hearings.

3. When may you request a stay? Soldier may make the request at any stage of the proceedings. ISSUE: What is the impact of the Internet, video teleconferencing, video depositions on determinations of unavailability?

- a) *But see Massey v. Kim*, 455 SE2d 306 (Ga. Ct. App. 1995) (Military defendant seeks stay to delay civil discovery until completion of overseas tour. Court rejects request pointing out improvements in modern communications since the passage of the SSCRA.);
- b) *Keefe v. Spangenberg*, 533 F.Supp. 49 (W.D. Okla. 1981) (Court denies stay request to delay discovery and suggests that service member agree to video tape deposition, IAW Fed. R. Civ. P. 30(B)(4)); and



- c) In re Diaz, 82 B.R. 162, 165 (Bankr. Ga. 1988) (“Court reporters may take depositions in Germany including videotape depositions for use in trials in this country.”).
- 4. Duration of stay - Period of service plus 60 days. Key = Reasonableness!! Keefe v. Spangenberg, 533 F.Supp. 49, 50 (W.D. Okla. 1981). Court grants soldier stay request for a one month continuance, but denies soldier request for a stay until his expected date of discharge three years later.
- 5. Burden of Proof - Boone v. Lightner, 319 U.S. 561 (1943) - at discretion of trial court.
  - a) As a practical matter - assume the burden is on the service member to show service has materially affected the ability to appear in court.
  - b) Military member must show material affect:
    - (1) Unavailability to Appear [no ability to take leave]: ISSUE: The new Welfare Reform Act of 1996 requires that the military services must promulgate regulations to facilitate the granting of leave for service members to appear in court and administrative paternity and child support hearings. See Pub. L. No. 104 - 193, § 363(b), 110 Stat. 2105 (1996); DOD Directive 1327.5, Leave and Liberty (IO 4, 10 Sep. 1997). See also Conrad, Note, "Child Support and Paternity Case Stay Actions Impacted by the Welfare Reform Act of 1996", The Army Lawyer, June 1998, at 13.
  - (a) Unsuccessful.
    - (i) Hibbard v. Hibbard, 431 NW2d 637 (Neb. 1988) - Court affirms adverse judgment against overseas soldier where soldier failed to use 38 day leave stateside to resolve pending support modification action.

(ii) Underhill v. Barnes, 288 S.E. 2d 905 (1982). Soldier made no showing of attempt to request leave, court took judicial notice of leave statutes and regulations and assumed he had 50 days accrued based on leave accrual and length of service.

(iii) Palo v. Palo, 299 N.W. 2d 577 (S.D. 1980) - Both parties were service members assigned to Germany. Wife took excess leave and emergency loan to travel to United States for divorce hearing. Husband made no showing of inability to do the same.

(iv) Rogers v. Tangipahoa Parish Sheriff's Office, 1997 WL 466922 (E.D. La. 1997); Bowman v. May, 678 So.2d 1135 (Ala. Civ. App. 1996); and Judkins v. Judkins, 441 S.E.2d 139 (N.C. 1994). (Soldier must make an actual showing of unavailability, including an effort to obtain leave. No showing and stay request denied.)

(b) Successful.

(i) Lackey v. Lackey, 278 S.E.2d 811 (Va. 1981) (Sailor deployed at sea sends affidavit from superior officer attesting to inability to appear or take leave for a limited period because of military sea duty.)

- (ii) *Cromer v. Cromer*, 278 SE2d 518 (N.C. 1981) (Sailor deployed on nuclear submarine has letter and affidavit from commander attesting to his inability to take leave until the submarine got to port.)
- (2) Actual Prejudice resulting from Non-Appearance.
  - (a) Sole issue at trial-uncontested facts=NO STAY.
    - (i) Real Property Valuation. *Cooper v. Roberts*, 722 SW2d 910 (Ky. Ct App. 1987).
    - (ii) Child Support Determination based upon income formula, where income is not disputed, or by Revised Uniform Reciprocal Enforcement of Support Act. *Jaramillo v. Sandoval*, 431 P2d 65 (N.M. 1967); 42 U.S.C. §§ 651-667 (1990); *State ex. rel. Adams v. Adams*, 455 NW2d 227, 230 n.2 (S.D. 1990)[RURESA]; *But see Schmidt v. Schmidt*, 444 NW2d 367, 372-73 (S.D. 1989) (Henderson, J., dissenting).
    - (iii) Uncontested Divorce Hearings. *Palo v. Palo*, *supra*.
    - (iv) Appeal of Judgment. *Kesler v. Kesler*, 682 SW2d 44, 45 n.1 (Mo. Ct. App. 1984).
  - (b) Service Member not Real Party in Interest=NO STAY.

- (i) Tort Liability-Soldier Defendant Insured
  - (a) Boone v. Lightner, 319 U.S. 561, 569 (1943).
  - (b) Underhill v. Barnes, 288 SE2d 905, 907 (Ga. Ct. App. 1982) (Service Member defendant not prejudiced where plaintiff has agreed to limit tort recovery to insurance policy limits.)
  - (c) Hackman v. Postel, 675 F.Supp 1132 (ND Ill. 1988) (Service member is only nominal defendant in personal injury action, and insurance company may not assert the SSCRA.)
- (ii) Subrogation Cases. Murphy v. Wheatley, 360 F2d 180 (5th Cir. 1966).
- (iii) Custody Cases-Not a Necessary Party. --Bubac v. Boston, 600 So.2d 951 (Miss. 1992). Military father not necessary party in proceeding by mother challenging retention of kids by paternal grandmother.
- (iv) Temporary Modification of Support. --Shelor v. Shelor, 383 S.E.2d 895 (Ga. 1989). As general rule, temporary modifications of child support do not materially affect rights of military defendant as they are interlocutory and subject to modification.

(c) Service member bad faith=NO STAY.

(i) Riley v. White, 563 So2d 1039 (Ala. Civ. App. 1990) (Soldier failed to submit to blood test in paternity action before going overseas, when aware of court proceedings, had attorney representation, and was previously given a delay by court to take test, denied stay.)

(ii) Hibbard v. Hibbard, 431 NW2d 637 (Neb. 1988) (Soldier for three years in contempt of court for refusing to comply with visitation orders of court, denied stay in ex-spouse's change of custody action.)

(iii) Judkins v. Judkins, 441 S.E.2d 139 (NC 1994). (Soldier receives several continuances because of military duty during Persian Gulf war, has attorney, fails to comply with court discovery orders, and seeks additional stay/continuances after discovery order disobedience.)

(3) What Type of Cases WILL courts find actual prejudice/material affect for SSCRA Stay?

(a) Personal Injury Claims-Plaintiff/Actual Defendant. Starling v. Harris, 151 SE2d 163 (Ga. Ct. App. 1966) (Soldier only eyewitness to tort other than other party.)

(b) Large Financial Disputes. Mays v. Tharpe & Brooks, Inc., 240 SE2d 159 (Ga. Ct. App. 1977) (Service member sued on guaranty on \$50,000 promissory note. Stay granted.)

(c) Contested Divorce, Custody, Paternity Cases.

- (i) Smith v. Smith, 149 SE2d 468, 471 (Ga. 1966) (Error to deny stay in divorce action where alimony at issue.)
- (ii) Lackey v. Lackey, 278 SE2d 811 (Va. 1981) (Change of child custody action involving servicemember's children, while he was unavailable to defend and had requested a stay, reversed).
- (iii) Mathis v. Mathis, 236 So2d 755 (Miss. 1970) (Service member's absence in paternity action materially affects ability to defend, unless specific findings made otherwise.)

- (4) Court discretion- if court finds material affect, the court must order a stay. If the stay request is denied, the court must make findings of fact about lack of material affect, or ensure that there is sufficient evidence in the record to warrant denial. Olsen v. Olsen, 621 NE2d 830 ( Ohio 1993).

6. Default Judgments (50 U.S.C. app. § 520).

a) Affidavit.

- (1) Must be prepared and filed by plaintiff.
- (2) Must state sufficient facts to give court reasonable basis to determine whether the respondent is in the military. Mill Rock Plaza Associates v. Lively, 580 N.Y.S.2d 815, 153 Misc.2d 254 (N.Y. City Civ. Ct. 1990)


- (3) Effect of failure to file.
  - (a) No entry of judgment until judge determines that the defendant is not in the military and has not requested a stay. *But see* Interinsurance Exchange Auto. Club v. Collins, 37 Cal. Rptr.2d 126 (Cal. App. 1994) (Clerk of Court may not refuse to enter a default judgment because no SSCRA affidavit is filed with the pleadings.)
  - (b) Remedy is not available to persons who are not in the military!
  - (c) Judgment obtained without affidavit is voidable not void.
  - (d) False affidavit subject to criminal penalties. 50 U.S.C. App. § 520(2).
- (4) Court-Appointed Attorney.
  - (a) Purpose. Ascertain whether the defendant is in the service and if so to request a stay on the defendant's behalf. *See State ex rel. Burden v. Smith*, 1994 WL 714505 (Ohio App 10 Dist., 22 Dec. 1994) (unpublished).
  - (b) Compensation: No specific provision in SSCRA - look to state attorney appointment and compensation powers.

- (c) Effect of failure to appoint. Most cases, no sanctions against judge and failure to appoint is not an abuse of discretion or reversible error unless respondent can show he was prejudiced by the failure to appoint counsel. Marriage of Lopez, 173 Cal. Rptr. 718 (Ca. App. 1981); McDaniel v. McDaniel, 259 S.W.2d 633 (Tex. Civ. App. 1953) (Prejudicial error to approve judgment in child support modification case contested by the parties, without determination that party to action was in the military.)
- (d) Judgment obtained without appointment is also only voidable, not void.
- (e) Recent cases: Civil Court appoints military SJA to serve as SSCRA counsel (San Diego Naval Station and Fort Stewart, GA). How to respond?
  - (i) Civil court has no jurisdiction over military attorney, unless a member of that state's bar.
  - (ii) Conflict of interest for SJA to represent an individual service member when the SJA is obligated to represent the military command by regulation.
  - (iii) State law (CA) requires permission of the military service Judge Advocate General for an SJA to represent an individual service member. [Check State Law.]

7. Reopening Default Judgments, 50 U.S.C. App. § 520(4) .

- a) Judgment must have been entered during term of service or within 30 days after termination of service.



- b) Application must be made to court during term of service or within 90 days of termination.
- c) The service member cannot have made any appearance.
  - (1) Filing an answer either pro se or through counsel is an appearance.
  - (2) Letter from Legal Assistance Attorney to court may be an appearance! **Don't Let Your Legal Assistance Attorneys File SSCRA Stays with a civil court!! See SSCRA Note, "Legal Assistance Attorney Asserts a SSCRA Stay and is Found in Contempt of Court", The Army Lawyer, March 1999, at p. 32.**
    - (a) Skates v. Stockton, 683 P.2d 304 (Ariz. Ct. App. 1984) (Even though court did not otherwise have personal jurisdiction, it determined that legal assistance attorney's letter requesting a stay constituted an appearance sufficient to give it personal jurisdiction; attorney failed to reserve defenses including jurisdiction). 
    - (b) Artis-Wergin v. Artis-Wergin, 444 N.W.2d 750 (Wis. Ct. App. 1989) (Legal assistance attorney requested a stay, but did not invoke SSCRA in request; court determined defendant had made an appearance and refused to reopen subsequent default judgment). *But see* Kasubaski v. Kasubaski, 1996 Wis. App. LEXIS 1014 (Wis. Ct. App. 1996) (unpublished) (Court criticizes the reasoning of Artis-Wergin, and suggests it was wrongly decided.)

- (c) *But see* Kramer v. Kramer, 668 S.W.2d 457 (Tex. Ct. App. 1984); Marriage of Lopez, 173 Cal. Rptr. 718,721 (Ca. App. 1981) (Appellate courts hold that defendant's letter or legal assistance attorney letter invoking SSCRA and requesting a stay did not provide personal jurisdiction that was otherwise lacking).

(3) There is hope - some things are not appearances!

- (a) Letter from Commander to court. Cromer v. Cromer, 278 S.E.2d 518 (N.C. 1981) (Court does not explicitly rule on re-opening under the SSCRA, but does remand case "in the interests of justice").

- (b) Letter to opposing counsel. Sacotte v. Ideal-Werk Krug, 359 NW2d 393 (Wis. 1984). (Letter to opposing counsel asserting SSCRA does not constitute an appearance.) Opposing counsel has a duty of candor towards a tribunal.

- (i) ABA Model Rule of Professional Conduct 3.3(d):

*In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.*

- (ii) Failure to report SSCRA stay request subjects opposing counsel to disciplinary action for professional responsibility violation.

- (c) Sample SSCRA letters to opposing counsel and for Commanders to assert stay at Appendix A.
- (d) SSCRA stay request is not an improper *ex parte* communication to a court, but a federally allowed *ex parte* communication. [Avoid the issue by having the commander send a copy of the stay request to opposing counsel.]
- (e) SSCRA stay request is not an illegal ghost pleading under the Iowa Rules of Professional Responsibility. *See* Iowa Board of Professional Ethics and Conduct Opinions 94-35 (May 23, 1995) and 96-7 (Aug. 29, 1996) (Iowa military attorneys may not prepare pleadings for military clients for jurisdictions where they are not admitted to practice or have been approved by local court motion to appear *pro hac vice*.)
- (f) Commanders requesting an SSCRA stay for a soldier, or legal assistance attorneys assisting a commander with such a request are not conducting unauthorized practice of law.
- (i) Section 521, U.S. Code provides in part that a stay request may be presented by the plaintiff or defendant "*or someone on his behalf*." The legislative history of the SSCRA makes clear that non-lawyers may make such requests to a civilian court pursuant to federal law.

- (ii) Federal law permits non-lawyers to represent individuals in specific instances, and that law must be obeyed in state courts. *See Del. Bd. On Unauthorized Practice of Law, Nol UPL-91-16 (1991)* (Paralegal's representation of individual before Delaware health agency pursuant to federal regulations does not constitute unauthorized practice of law. Board may not take action contravening express federal regulations or statutes.)

d) Criteria to re-open default.

- (1) Military service prejudiced ability to defend, AND
- (2) Meritorious Defense - Defendant must reveal the defense to all or part of the original action.
- (3) Good Example. *Hawkins v. Hawkins*, 1999 Tex. App. LEXIS 6362, \_\_ S.W.2d \_\_ (Tx. App. Aug. 26, 1999) (SM unable to take leave to defend in divorce action overturned default judgment of civil court that declared his paternity of two children of his estranged wife without any DNA test, child support for said children, and miscalculated his military retirement benefits division upon divorce. SM's situation showed clear prejudice, and he had a meritorious defense to the default divorce judgment.)

8. Stay or Vacation of Judgments, Attachments & Garnishments (50 U.S.C. § 523).

- a) Military service materially affects ability to comply with judgment, court-ordered attachment, and/or garnishment, e.g. child support orders.

- b) Court may stay execution of any judgment or court order entered against service member. Court may vacate or stay any court-ordered attachment or garnishment of property, wages, or money in the hands of another either before or after judgment. ISSUE: Administratively determined involuntary allotments for child support arrears enforcement not subject to this provision. See 42 U.S.C § 665; 5 C.F.R. § 581.302(b)(4); 32 C.F.R. § 584.9; 32 C.F.R. Part 541 (1996); and Welfare Reform Act of 1996, Pub. L. No. 104-193, §§ 325, 363, 110 Stat. 2105 (1996).
- c) DFAS, which processes all military garnishment requests for support orders, has rarely seen this SSCRA provision asserted by military members or legal assistance counsel.

9. Assessing the default judgment case.

- a) Can you afford to do nothing?
- b) Material affect and meritorious defense?
- c) Adverse action from default - garnishment or involuntary allotment? [Involuntary Allotment of military pay affects only RC soldiers on active duty > 180 days. DOD Dir. 1344.9, and DOD Instr. 1344.12.]

#### **IV. INVOLUNTARY ALLOTMENTS AND THE SSCRA.**

##### **A. HATCH ACT REFORM AMENDMENTS - 1993.**

1. Law prior to 1993 - Sovereign immunity prevented garnishment of federal employee pay except for family support. See, e.g., *Omega v. Koller*, 503 F. Supp. 149 (D.C. Md, 1980) (Consumer Credit Protection Act held not a specific waiver of sovereign immunity for garnishment).
2. Garnishment Equalization Act - Introduced as S. 316 in 101st Congress (Chief sponsor - Sen. Craig). Reintroduced as S. 253 in 102d Congress. Merged into Hatch Act Reform Amendments, P.L. 103-94; signed by President on October 11, 1993. Now codified at 5 U.S.C. § 5520a.
  - a) Waived sovereign immunity for civilian federal employee pay.
    - (1) Estimated annual defaulted debt of federal employees \$1.3 Billion.
    - (2) Estimated number of federal employees with defaulted debt based on Postal Service experience - 2% of federal workforce, including military.
  - b) Directed DoD to promulgate regulations providing for involuntary allotment of military pay to account for "the procedural requirements of the Soldiers and Sailors Civil Relief Act...and in consideration for the absence of a member of the uniformed services from an appearance in a judicial proceeding resulting from the exigencies of military duty."

##### **B. INVOLUNTARY ALLOTMENTS FOR CREDITOR JUDGMENTS - DOD DIRECTIVE 1344.9; DOD INSTRUCTION 1344.12.**

1. Initiation Procedure.
  - a) Final order of court with specific money award, and DD Form 2653.
  - b) Served on designated agent - DFAS - Cleveland.
2. Certifications [DD Form 2653]:
  - a) Judgment not modified or set aside.
  - b) Not issued while service member was on active duty. If the service member was on active duty, the SSCRA was followed fully.
  - c) State law allows garnishment of a similarly situated civilian.
  - d) Debt has not been discharged in bankruptcy or barred by other legal impediment.
  - e) Creditor agrees to repay service member within 30 days if payment to creditor is erroneous.
3. Amounts Available.
  - a) Pay includes - Disposable (generally taxable) pay (only).
  - b) Maximum amount of allotment - 25% of disposable pay or lower if state law provides for lower amount. The states of NC, SC, NH, PA, TX do not allow garnishment of wages for commercial debts, thereby precluding involuntary allotment actions from debt actions in those states.

- c) Creditors now charged a \$75 processing fee out of their 25% pay allotment per the DoD Authorization Act of Fiscal Year 1996, Pub. L. No. 104-106, § 643, 110 Stat. 368, codified at 5 U.S.C. §§ 5520a (j)(2), (k)(3), and (l) [1996]. *See also* 61 Fed. Reg 53722 (15 Oct. 1996). This provision is being contested by creditors, as DoD is the only federal agency to deduct fees from the judgment amount.
- 4. DFAS action.
  - a) Facial review.
  - b) Mail notice [DA Form 2653] to service member [90 day clock starts].- No time limit for DFAS to issue notice. Mail two additional copies to the "immediate commander" with DD Form 2654.
- 5. Command action ("Immediate Commander").
  - a) Serve service member with copy of notice and DD Form 2654 (Rights Warning Form) [5 day req.]
  - b) Inform service member of rights to contest the involuntary allotment [15 days to respond].
  - c) Grant 30 day extension to respond if necessary. No response back to DFAS within 90 days from initiation of process results in automatic involuntary allotment.
- 6. Service member's actions.
  - a) Consent.
  - b) Seek legal assistance.
- 7. Service member defenses:



- a) The SSCRA was not followed in the underlying judgment.
- b) Military exigency caused the absence of the service member from appearance in a judicial proceeding which forms the basis of the judgment.
- c) The application for allotment is false or erroneous in material part.
- d) The judgment has been satisfied, set-aside, or modified.
- e) A legal impediment (e.g. bankruptcy) prevents processing the allotment.
- f) "Other appropriate reasons..." Violation of consumer law-underlying judgment.

8. Immediate Commander Response.

- a) Rule on military exigency defense only.
  - (1) Standard of review - preponderance.
  - (2) Definition - "[M]ilitary assignment or mission essential duty that, because of its urgency, importance, duration, location or isolation, necessitates the absence of a member of the military service from appearance at a judicial proceeding. Absence from an appearance in a judicial proceeding is normally to be presumed to be caused by exigencies of military duty during periods of war, national emergency, or when the member is deployed."
- b) Provide name and address of appellate authority for military exigency appellate determination by creditor.

- c) Forward debtor response to DFAS. Debtor failure to timely respond results in automatic initiation of involuntary allotment.
- 9. DFAS decides all other defenses, except military exigency. No appeal of DFAS determinations.

## **V. SUSPENSION OF STATUTES OF LIMITATION (50 U.S.C. APP. § 525).**

### **A. Tolls the running of the statutes.**

- 1. During the service person's period of service.
- 2. With respect to civil and administrative proceedings.
- 3. Involving the service member as either plaintiff or defendant.
- 4. Except for the internal revenue laws! 50 U.S.C. App. § 527.

### **B. Issues.**

- 1. Career Military - Conroy v. Aniskoff, 507 U.S. 511, 113 S. Ct. 1562, 123 L.Ed.2d 229 (1993).
  - a) The tolling applies regardless of whether the service member is inducted, volunteers, is a one-term or a career military member.
  - b) In addition, court held no requirement to show material affect.
- 2. Does "all proceedings" mean all?

- a) Board for Correction of Military Records - tolled. *Detweiler v. Pena*, 38 F. 3d 591 (D.C. Cir. 1994) ("any" means "any"). *Detweiler* overrules other case law that indicated the BCMR statute was not tolled. (*Allen v. Card*, 799 F. Supp. 158 (D.C. 1992) (pre Conroy), *Miller v. United States*, 29 Fed. Cl. 107 (1993)(post Conroy)). Department of Defense requested a legislative override of *Detweiler*, which was included in the FY 1997 DoD Authorization Act bill, but was deleted in conference committee.
  - b) Merit Systems Protection Board - tolled, *Davis v. Dep't of the Air Force*, 51 M.S.P.R. 246 (1991).
  - c) Bankruptcy - tolled, *In re A.H. Robins v. Dalkon*, 996 F.2d 716 (4th Cir. 1993). "The statute contains no exceptions and is drafted in extraordinarily broad terms...The broad, unqualified and mandatory language of section 535 leaves little room for judicial interpretation...." *Id.* at 718.
3. Laches. The SSCRA provision does not prevent assertion of the equitable principle of laches. See *Detweiler v. Pena*, 38 F 3d 591, 595 (D.C. Cir. 1994). Laches = inexcusable delay by petitioner plus prejudice to respondent's ability to defend.

## **VI. ARTICLE III - RENT, LEASES, INSTALLMENT CONTRACTS, MORTGAGES, LIENS AND ASSIGNMENTS (50 U.S.C. APP. §§ 530-536)**

- A. Protected Persons - Active Duty personnel and dependents in their own right.
- B. Protection from Eviction from Leased Housing (50 U.S.C. App. § 530).
  - 1. Premises occupied - must be a dwelling place of the service member or dependents.
  - 2. Rent may not exceed \$1200 per month. - changed from \$150 by Desert Shield/Storm amendments.

3. Judicial Relief Available. Court shall upon application of service member or eligible dependent, and may, on its own motion grant the following:

- a) Stay of eviction proceedings for up to 3 months, or,
- b) Make any other "just" order.
- c) Unless the court finds no material affect.
- d) Criminal Sanctions for Landlord "self-help" eviction.

C. Termination of Pre-Service Leases (50 U.S.C. App. § 534).

1. Purpose: to permit lawful termination of a pre-service lease of premises by a service member entering active duty [or by his or her dependent in their own right (see § 536)].

2. Criteria for relief.

- a) The service member need NOT show material affect.
- b) The service member need only show:
  - (1) The lease was entered into prior to entry into military service,
  - (2) The lease was executed by or on behalf of the service member,
  - (3) The leased premises were occupied for dwelling, professional, business, agricultural, or similar purposes by the service member or the service member and his or her dependents, and
  - (4) The service member is currently in military service.

- c) Landlord may seek “equitable offset” for unreasonable costs/expenses incurred as the result of early military tenant termination, e.g., realty fees, cost of special fixtures installed at tenant request, etc. Such landlord equitable offset may be greater than the amount of tenant rent and security deposit remaining under the lease term. *Omega Industries, Inc., v. Raffaele*, 894 F.Supp. 1425 (D. Nev. 1995). *See also* Conrad, Note, *Pre-Service Lease Terminations May Be Subject to Landlord "Equitable Offsets"*, *The Army Lawyer*, April 1997, at 153.

## **VII. INSTALLMENT CONTRACTS AND AUTO LEASES (50 U.S.C. APP. § 531).**

1. Applies only to **pre-service obligations** by either service member or spouse who can show material affect as to ability to pay on installment contracts such as appliances, furniture, and motor vehicles.
2. Prohibits self-help repossession of items purchased on installment contract.
  - a) Leased automobiles or other items arguably included if Option to Purchase Clause in lease agreement.
  - b) SSCRA does not terminate automobile leases!
3. Criminal penalties for violating repossession provisions of this section.
4. Upon service member showing of material affect to a court a stay may be granted and the creditor may only seek repossession of the item purchased on installment contract by obtaining a court order after obtaining a judgment on the debt.

5. Practice Pointer in Auto Lease Cases: While you may not threaten criminal action to settle a civil matter, you may point out any potential violations of this section to a creditor or their counsel (self-help repossession), and suggest a possible settlement of the matter, by allowing the soldier to voluntarily surrender the vehicle in return for the creditor waiving all early lease termination penalties.

## **VIII. ENFORCEMENT OF STORAGE LIENS (50 U.S.C. APP. § 535).**

- A. General: Persons with storage liens on property of service members may not exercise any right to foreclose or enforce any lien during the service member's period of military service and for three months thereafter except upon court order.
- B. Judicial Relief.
  1. Court shall (upon application by service member) and may upon its own motion,
    - a) Stay proceedings, or
    - b) Grant other equitable relief to conserve interests of all parties.
    - c) unless there is no "material affect" (if the service member's ability to pay the storage charge is not materially affected by service).
- C. Criminal Sanctions. Any person who knowingly takes any action contrary to this section, or attempts to do so, shall be fined as provided in 18 U.S.C., or imprisoned for not to exceed one year, or both. 50 U.S.C. app. § 535(3). *See, United States v. Bomar*, 8 F.3d 226 (5th Cir. 1993). [Note that the United States prosecuted criminally this case on behalf of the soldier].

## **IX. MORTGAGES, TRUST DEEDS, ETC. (50 U.S.C. APP. § 532).**

- A. In court actions to enforce mortgage obligations, court shall (upon application by service member) and may (upon its own motion) grant relief to service member [or dependent pursuant to § 536] unless military service does not materially affect ability to comply with obligation.
- B. Criteria for relief.
  - 1. Obligation is secured by a mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property,
  - 2. Obligation entered before entry into military service,
  - 3. Property owned by service member [or dependent] before entry into military service
  - 4. Property is still owned by service member or dependent at time relief is sought, and
  - 5. Military service materially affects ability to comply with terms of obligation, such breach occurring prior to or during period of such military service.
- C. Judicial relief:
  - 1. Court shall (upon application by service member) and may upon its own motion,
    - a) Stay proceedings, and/or
    - b) Grant other equitable relief to conserve interests of all parties (i.e., reduce or suspend installment payments)
    - c) unless there is no "material affect."

2. No sale, foreclosure, or seizure of property shall be valid if made during the period of military service or within 3 months thereafter, except pursuant to an agreement (§ 517), unless upon an order previously granted by the court and a return thereto made and approved by the court.

## **X. ARTICLE VII - FURTHER RELIEF [50 U.S.C. APP. § 590].**

- A. Stay of Enforcement of Obligations, Liabilities, Taxes (50 U.S.C. App. § 590).
  1. Person may, at any time during military service or within 6 months thereafter, apply to court for relief of any obligation or liability incurred by such person prior to active service or in respect to any tax or assessment whether falling due prior to or during active military service.
  2. Court may grant stays of enforcement during which no fine or penalty shall accrue if service materially affected ability to comply with obligation or pay tax or assessment.
    - a) There need be no default or legal action pending to get protection, but applicant must prove "material affect." Application of Marks, 46 N.Y.2d 755 (1944).
    - b) Dependents receive protection. Morris Plan Indus. Bank of N.Y. v. Petluck, 60 N.Y.2d 162 (1946).
- B. Real World Problem : Reserve soldier (Physician) had pre-service BMW auto lease (7 series) he could not afford while on active duty during Desert Storm. He voluntarily gave it back to the dealer. After he returned from Desert Storm, the dealer sued him for \$31,000 deficiency. What should the soldier have done to try and prevent this? He should have used § 590 to get prospective relief from the lease obligation.

## **XI. CONCLUSION**

## **SIGNIFICANT SSCRA PROVISIONS**



<u>SSCRA Provision:*</u>	<u>Pre-Service Obligation</u>	<u>Service Obligation</u>	<u>Post-Service</u>
6% Interest Cap [Section 526]	Yes.	No.	No.
Civil Court Stay [Section 521]	No.(Only applies Active Duty)	Yes.	Yes. Up to 60 days
Reopen Judgment [Section 520(4)]	No.	Yes.	Yes. Judgments up to 30 days from discharge. Reopen up to 90 days from discharge.
Toll Statute of Limitation [Section 525]	No.	Yes. Civil & Admin Actions.	No.
Eviction Protection [Section 530]	No.	Yes. Rent<1200/mo	No.
Termination of Lease [Section 534]	Yes. Residential, Commercial/Prof.	No.	No.
Mortgage Foreclosure [Section 532]	Yes. Obligation was pre-service .	No.	No.
Storage Liens Protection	Yes.	Yes.	Yes. Up to 3 [Section 535(2)] months from discharge.
Installment Contract/ Auto Leases [Section 531]	Yes. (Pre-service only)	No.	No.
Anticipatory Relief [Section 590]	Yes. (Pre-service obligation, liability,penalty or tax)	Yes. (Service obligation Liability, penalty or tax)	No. May apply during service or up to 6 months after to court.

\*Section Numbers keyed to SSCRA as codified at 50 App. U.S. Code.



## **APPENDIX A**

# **SAMPLE SSCRA LETTERS**



Sample Letter to Creditor  
Reduction of Interest Rate

**[LETTERHEAD]**

**[Date]**

Legal Assistance Office

**[CREDITOR ADDRESS]**

Dear **[Sir or Madam]**:

I am a legal assistance attorney writing on behalf of **[CLIENT]**. **[CLIENT]** informs me that **[he/she]** is currently obligated to your company for a loan bearing an interest rate of **[%]**. I further understand that this obligation was entered into on **[DATE]**.

Since incurring this obligation, **[CLIENT]** has entered the active military service of the nation in the U.S. **[SERVICE]** on **[DATE]**. This entry into active military service has materially affected **[CLIENT's]** ability to meet this obligation. Under these circumstances, federal law prescribes the maximum interest rate which **[CLIENT]** may be charged.

The Soldiers and Sailors Civil Relief Act (50 U.S.C. App. § 526) prescribes a ceiling of 6% annual interest on any obligation under the circumstances described above. This interest rate must be maintained for the entire period that **[CLIENT]** is on active duty. The percentage cap includes all service charges, renewal charges, and fees. The rate is applied to the outstanding balance of the obligation as of the date of entry onto active duty mentioned above. Any interest charge above this statutory ceiling must be forgiven, not accrued.

Please ensure that your records reflect this statutory ceiling and that any charges in excess of a 6% annual rate are withdrawn. You should also be aware that federal law (50 U.S.C. App. §531) circumscribes the manner in which you may enforce certain rights under the contract, including any right to repossession of property.

I thank you in advance for your attention to this matter. Should there be any questions, please feel free to contact me at the address above.

Sincerely,

**[ATTORNEY NAME]**

**[RANK]**, U.S. Army

Sample Letter to Opposing Counsel

Requesting a Stay of Proceedings

**[LETTERHEAD]**

**[Date]**

Legal Assistance Office

**[COUNSEL'S ADDRESS]**

Dear **[Sir or Madam]**:

I am a military legal assistance attorney writing on behalf of **[CLIENT]**. **[CLIENT]** is the defendant in an action you filed on behalf of **[OPPOSING PARTY]** in **[COURT]**. The mission of our office is to provide initial counseling to soldiers to help them make more informed decisions about their legal obligations. We are not allowed to represent soldiers in any fashion in these types of civil actions. [ELAP jurisdictions delete the prior sentence.] I am not **[CLIENT's]** attorney for the underlying matter and this letter should not be construed as an appearance or submission to jurisdiction. Rather, I am simply assisting **[CLIENT]** in protecting his interests until such time as he can obtain proper legal counsel.

**[CLIENT]** is currently in the active military service of the nation in the U.S. **[SERVICE]**. Federal law affords such service people certain rights prescribed by the Soldiers and Sailors Civil Relief Act. Among these rights is the stay of all legal proceedings during the period of active service when the service members ability to conduct a defense is materially affected. 50 U.S.C. App. § 521. In this case, **[CLIENT]** informs me that he will not be able to attend any proceedings and protect his interests until **[DATE]**. This inability to appear is caused by **[REASONS]**, direct results of his military service. **[CLIENT's]** inability to attend is supported by the attached memorandum from his commanding officer.

Because **[CLIENT's]** military service prevents his appearance, I request that you advise the court of **[CLIENT's]** status and request a stay until **[DATE]**. I further request that you advise **[CLIENT]** of any action you take at **[ADDRESS]**.

Thank you in advance for your help in affording **[CLIENT]** an opportunity to participate in the legal process while meeting his obligations to the defense of our nation.

Sincerely,

**[ATTORNEY NAME]**

**[RANK]**, U.S. Army

Sample Letter to the Clerk of Court  
Requesting a Stay of Proceedings

**(NOTE: This letter should be prepared for the signature of the client's commanding officer. At least one court has construed a letter directly from a legal assistance attorney to be an appearance causing the client to lose valuable rights!)**

**[LETTERHEAD]**

**[Date]**

Commander

**[CLERK OF COURT ADDRESS]**

Dear **[Sir or Madam]**:

I am an officer in the U.S. **[SERVICE]** writing on behalf of **[CLIENT]**, who is the defendant in an action now pending before your court, **[CASE ID NUMBER]**. **[CLIENT]** is currently serving in the active military service of the nation at **[INSTALLATION]**. He is assigned to my command.

**[CLIENT]** will be unable to attend any hearings, present any type of defense, or effectively protect his interests in the matter in question until **[DATE]** because of his military duties. Until this date, **[CLIENT]** is needed by this unit to/because **[REASONS]**<sup>1</sup>. **I am advised by legal counsel that federal law allows a stay of proceedings for service members on active duty when their ability to defend themselves is materially affected by their military service (50 U.S.C. App. § 521). In this instance, [CLIENT's] critical role in the national security mission of this command precludes his participation in court proceedings until [DATE]. He will be unable to present any defense at all due to his duties.**

---

<sup>1</sup> ~~§~~Reasons should clearly outline the duties to which the soldier must attend and why he cannot take leave. Examples would be ~~§~~to participate in a unit deployment to the National Training Center,~~§~~ ~~§~~to deploy to Bosnia as part of the UN Implementation Force,~~§~~ or ~~§~~to prepare forces for deployment to Haiti.~~§~~ Whatever reason is given, the reasons why the soldier is critical to this mission must be explained.

Request that you grant a stay in the proceedings until [DATE] to allow [CLIENT] to properly attend to both of his obligations. I will personally ensure that he is placed on leave immediately following the completion of the duties described above, so that he may appear at the next scheduled court date after [DATE]. I should note that I am not an attorney and am not making this request based on any attorney-client relationship between myself and [CLIENT]. I am not representing [CLIENT] with regard to the proceedings pending in your court. This letter should not be considered an appearance by [CLIENT]. Rather, it is a request in my capacity as a commander, charged with a mission supporting the national security of this nation, that you delay the proceedings to allow this soldier to perform his critical part in that mission.

Thank you in advance for your assistance in this matter. I request that you inform myself or [CLIENT], at the above address, of any action taken regarding this request.

Sincerely,

[COMMANDER NAME]  
[RANK], U. S. Army  
Commanding Officer



**CHAPTER T**  
**STATE TAXATION**  
**SOLDIERS' AND SAILORS' CIVIL RELIEF ACT**  
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**CHAPTER S**  
**STATE TAXATION**  
**SOLDIERS' AND SAILORS' CIVIL RELIEF ACT**  
**OUTLINE**

**I. REFERENCES**

- A. U.S.C. App. § 574 (1990 with 1994 Supplement).
- B. TJAGSA Publication JA 260, Soldiers' and Sailors' Civil Relief Act Guide, Ch. 6 (July 2000).
- C. Conrad, "Nonmilitary Spouse's Joint Ownership of Personal Property Voids Soldiers' and Sailors' Civil Relief Act Personal Property Tax Protection," The Army Lawyer, August 1997 at 24.
- D. Veldhuyzen and Wright, "Domicile of Military Personnel for Voting and Taxation," The Army Lawyer, September 1992 at 15.

**II. INTRODUCTION**

- A. THE AUTHORITY OF THE STATE TO TAX.
  - 1. General - A state can tax all income, from whatever source derived, of domiciliaries and statutory residents.
  - 2. With respect to nonresidents, states may tax all income earned within the state.

3. Definitions:

- a) Domiciliary - a person is a domiciliary of: "That place where a man has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning." Black's Law Dictionary 572 (5th ed. rev. 1979).
- b) BOTTOM LINE: Domicile or Legal Residence = Physical Presence and Intent to Permanently Reside in State. *See Appendix A, Fort Sheridan Tower* article, "Definition of 'Legal Residence'". 26 February 1988.
  - (1) Indicia of domicile. Domicile must be determined by considering and weighing the facts in each individual case. Factors normally considered include the following:
    - (a) Expressed intent, oral or written.
    - (b) Degree of Physical presence, past and present (including duration, reasons for absences)
    - (c) Residence of immediate family.
    - (d) Location of schools attended by children.
    - (e) Payment of nonresident tuition to institutions of higher education.
    - (f) **Payment of taxes (income and personal property).** [Important factor.] *But see* Wolff v. Baldwin, 9 NJ Tax 11 (N.J. Tax Court 1986) (One cannot establish domicile by paying taxes alone; physical presence is also necessary.)
    - (g) **Ownership of real property.** [in particular, continued ownership of a past residence.]

- (h) Leasehold interests.
- (i) Situs of personal property.
- (j) **Voter registration.** [Important factor.] *See* Ca. Franchise Tax Board Legal Ruling No. 54, Residence: Effect of Military Personnel Registering to Vote, 1958 Cal. FTB LEXIS 54 (Cal. FTB 1958), and Veldhuyzen and Wright Army Lawyer article, "Domicile of Military Personnel for Voting and Personnel", Sep. 92 at 15. What about impact of "motor voter" laws?
- (k) **Vehicle registration.**[Important factor.] *See* Matter of Karsten, 924 P.2d 1272 (Ks. App. 1996) (Voluntary registration of motor vehicle doesn't equal automatic change of domicile).
- (l) **Motor vehicle operator's permit.**[Important factor.]
- (m) Location of bank and investment accounts.
- (n) Explanations for temporary changes in residence.
- (o) Submission of DD Form 2058 (Change of domicile form-Appendix C).
- (p) Home of record at the time of entering service.
- (q) Place of marriage.
- (r) \*\*\*Spouse's domicile. (see discussion below)
- (s) Place of birth.
- (t) Business interests.

- (u) Sources of income.
  - (v) Outside employment.
  - (w) **Declarations of residence on legal documents such as wills, deeds, mortgages, leases, contracts, insurance policies, and hospital records.**  
[Important factor.]
  - (x) **Declarations of domicile in affidavits or litigation.** [Important factor.]
  - (y) Address provided on federal income tax return.
  - (z) Membership in church, civil, professional, service or fraternal organizations.
  - (aa) Ownership of burial plots.
  - (bb) Place of burial of immediate family members.
  - (cc) Location of donees of charitable contributions.
- (2) Spouse's Domicile.
- (a) Following arcane common law, some states mandate that a wife automatically assumes her husband's domicile, regardless of her intent.
  - (b) See, Ill. Ann. Stat. ch. 23, para. 2-10 (West 1992) (the residence of a married woman shall be that of her husband unless they are living separate and apart, in which case she may acquire a separate residence).

- (c) See also, Restatement (Second) of Conflicts § 21 (1988) ("...there were at least two reasons for the common law rule.... (first) the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband.... This view is no longer held. The second reason for the common law rule was the desirability of having the interests of each member of the family unit governed by the same law...").
- (d) More states, however, are providing that a woman's domicile is established independently of her husband. These states include, among others, California, Colorado, Georgia, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, Virginia, and Washington.
- (e) See comment to Va. Code Ann. § 20-91 (1992), *Kerr v. Kerr*, 371 So. 2d 30 (Va. Ct. App. 1988) (The outmoded expectation that a wife is expected to follow her husband's change of abode is no longer applicable.)

(3). Case by case balancing of above determines intent.

- c) Residence - implies something more than mere physical presence and something less than domicile: [Some states refer to "legal residence" as equivalent to "domicile".]
- (1) "Personal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently.

- (2) Residence means living in a certain locality, but domicile means living in that locality with intent to make it a fixed and permanent home." Black's Law Dictionary, 1176 (5th ed. rev. 1979).
  - d) Statutory resident - a person receives tax treatment as if he or she was a domiciliary provided he or she resides in the state the statutory number of days.
    - (1) Cal. Rev. & Tax. Code § 17014(a) (West) ("Resident" includes: (1) Every individual who is in this state for other than a temporary or transitory purpose...) and § 17016 ("Every individual who spends in the aggregate more than nine months of the taxable year within this State shall be presumed to be a resident. The presumption may be overcome by satisfactory evidence that the individual is in the State for a temporary or transitory purpose." (Emphasis added.)).
    - (2) *See* 1991 proposed change in definition of California statutory resident to include military personnel and military response at Appendix B.
  - e) Nonresidents - are ordinarily defined in the negative: "One who does not reside within the jurisdiction in question; not an inhabitant of the state...." Black's Law Dictionary, 953 (5th ed. rev. 1979).
4. Special State Military Treatment: Some states treat certain domiciliary military members as nonresidents for tax purposes. The tests for such status vary.
- a) In some states, domiciliaries who are in the military service and are stationed outside the state are not required to pay state taxes while they are so stationed (Pennsylvania, Illinois).
  - b) Other states (New York, Missouri) employ a three-part test which permits domiciliaries to avoid state taxes if the domiciliary:
    - (1) Maintains no permanent place of abode in state of domicile.



- (2) Maintains a permanent place of abode outside state of domicile.
- (3) Spends a maximum of 30 days within state of domicile during the tax year in question.
- (4) *See, e.g.,* N.Y. Tax Law § 605 (McKinney) ("A resident individual means an individual: (1) who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state."). [*See* Matter of Gatchell, 1984 N.Y. Tax Comm. 1984] (Service member who lives in a military barracks does not have a "permanent place of abode" and does not get the income tax exemption).]

5. Change of Legal Residence/Domicile.

- a) Physical presence in the new state. [*See* Juskowiak v. Com'ssr of Revenue, 1996 Minn. Tax LEXIS 17 (Minn. 1996) and Letter No. IT 96-0010, 1996 WL 305698 (Ill. Dept. Rev. 1996) (unpub.) (Problems of JAG officer claiming change of legal residence from Wisconsin to Illinois)], AND
- b) Indications of simultaneous intent of making the new state the permanent domicile/legal residence. *See* Matter of Karsten, 924 P.2d 1272 (Ks. App. 1996) (Purchasing a house or registering a motor vehicle in a host jurisdiction does not automatically change a service member's domicile subjecting them to local taxation, unless the service member indicates intent to change domicile.)
- c) DD Form 2058 (Appendix C). Advises DFAS of change in state tax withholding based on change in domicile.

### **III. PRINCIPLES OF THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT - 50 U.S.C. APP. § 574.**

- A. U.S.C. app. § 574 provides that:

1. The service member neither acquires nor loses residence or domicile solely by residing in a given state pursuant to military orders.
  2. Military income is deemed to be earned in the state of domicile.
  3. A service member's personal property is deemed to be located in state of domicile.
- B. U.S.C. App. § 574 protects military income from double taxation because:
1. Military income is taxable only by the service member's state of domicile, AND
  2. A service member neither acquires nor loses domicile based on presence in a given state pursuant to military orders.
- C. § 574 is constitutionally valid. Dameron v. Broadhead, 345 U.S. 322, 73 S.Ct. 721 97 L.Ed. 1041 (1953).
- D. A service member's nonmilitary income is not protected from double taxation by § 574. Nonmilitary income can be taxed by:
1. The service member's state of domicile, which can tax all income from whatever source derived.
  2. The state in which the income is earned (the legal fiction that a service member's income is earned in the state of domicile applies only to military compensation).
- E. Native American Military Member Exception. Fatt v. Utah State Tax Commission, 884 P.2d 1233 (Utah 1994) and Turner v. Wis. Dep't of Revenue, 1986 W.L. 2536 (Wis. Tax App. Comm. 1986) (unpub.)(Native American service member's military income is deemed to be earned on his/her federal reservation domicile and thus is not subject to state income taxation.)

#### **IV. STATE TAXATION OF SERVICE MEMBER'S SPOUSE'S INCOME.**

- A. Spouses are not protected by 50 U.S.C. App. § 574. Consequently, they may be taxed by:
1. The spouse's state of domicile, which can tax all income from whatever source derived.
    - a) The spouse's current host state if the spouse has become a statutory resident under that state's law, because a state in which one is a statutory resident can tax that individual on all income from whatever source derived. (The legal fiction that income is earned in the state of domicile applies only to a service member's military compensation.)
    - b) The state in which the spouse earned the income, because the state in which nonmilitary income is earned can tax that income.
  2. NOTE: While spouses may be taxed by multiple states, they will likely receive relief in the form of taxation credit.
- B. Trend toward less comprehensive protection of the spouse's income. *United States v. Kansas*, 580 F. Supp. 512 (D. Kan. 1984), aff'd, 810 F.2d 935 (10th Cir. 1987). Kansas, Utah, Missouri, Nebraska, Vermont, and California include nonresident military income in determining tax rate of non-exempt income of either spouse. (AKA "The Kansas Rule"). This has the effect of driving the effective tax rate higher.

#### **V. STATE TAXATION OF REAL AND PERSONAL PROPERTY**

- A. Ad valorem taxation: "A tax imposed on the value of property. The more common ad valorem tax is that imposed... on real estate. Ad valorem taxes can, however, be imposed upon personal property; e.g., a motor vehicle tax may be imposed upon the value of an automobile and is a tax." Black's Law Dictionary, 48 (5th ed. rev. 1979).

- B. The taxation of real property is not affected by § 574, because real property is taxed where it sits. Real property is: "land, and generally whatever is erected or growing upon or affixed to land." Black's Law Dictionary, 1096 (5th ed. rev. 1979).
- C. Ad valorem taxation of personal property.
1. Normally, actual physical location of the property on "tax day" controls.
  2. The service member's personal property.
    - a) A service member's solely owned personal property, however, is deemed to be located in the service member's state of domicile, and only the state of domicile can tax it. 50 U.S.C. App. § 574.
      - (1) *United States v. Arlington Co., Va.*, 326 F.2d 929 (4th Cir. 1964) - Naval officer, domiciliary of New Jersey, stationed in Virginia, but on sea duty, who left family and personal property in Virginia could not be taxed by Virginia.
      - (2) Virginia Attorney General Opinion, June 12, 1984 - Although a non-domiciliary service member's personal property may be located in a jurisdiction other than where he/she is stationed, property still exempt from taxation in any jurisdiction of host state. Service member stationed in Arlington cannot be taxed on his auto, though solely driven by wife in another city.
    - b) The service member is absolutely immune from taxation of nonbusiness personal property by the host state regardless of whether the service member pays personal property tax on the property to the state of domicile. *But see: Sullivan v. United States*, 395 U.S. 169 (1969) - 50 U.S.C. App. § 574 prohibits only annually recurring taxes on property; sales, use or excise tax is permissible.
      - (1) Sales Tax. See *In re Sales/Use Tax* December 1983, No. 85-73, 1985 R.I. Tax LEXIS 72 (R.I. Tax Comm. 1985) (Service members must pay local sales tax on purchase of motor vehicle).

- (2) Use Tax. See Re: Section 58.1-1821 Application Retail Sales and Use Tax, 1994 Va. Tax LEXIS 275 (Va. Tax Comm. 1994) (Service member stationed in Virginia purchased furniture in North Carolina but paid no North Carolina sales tax, is subject to Virginia use tax on purchase).
  - c) The § 574 protection for a service member's personal property does not apply to property used by the service member for business or income producing purposes. With respect to such property, situs controls.
3. Personal property solely owned by the service member's spouse.
- a) Generally, the traditional rule of situs controls.
  - b) If, however, the property is located on a military reservation subject to exclusive federal jurisdiction, the property cannot be taxed by the state in which the reservation is located. The property can, however, be taxed by the spouse's state of domicile.
4. Personal property which is jointly-owned or is community property may be subject to double taxation:
- a) By the service member's state of domicile because it is deemed to be located in that state for purposes of personal property taxation.
  - b) By the state in which it is physically located because situs governs taxation of the spouse's personal property.
  - c) State taxation schemes.
    - (1) Some states tax the property at half value.
    - (2) Some states tax property according to a party's proportionate contribution toward the purchase price.

- (3) A few states tax the property at full value. See 1976-77 Va. Op. Atty. Gen. 285 (14 Oct. 76) and 1986 Ariz. Op. Atty Gen. 111 (Op. # 186-092) (25 Aug. 86).
- (4) Some do not try to tax it at all: See: Mississippi Attorney General Opinion, Feb. 27, 1989 - ad valorem taxes may not be levied on autos owned jointly by military and non-military spouses.

## **VI. MOTOR VEHICLES**

- A. The vehicle itself is subject to personal property taxation according to previously stated rules:
  - 1. Vehicles owned solely by a service member are subject to ad valorem personal property taxation only by the service member's state of domicile.
  - 2. Jointly owned and community property state vehicles may be subject to double personal property taxation. (Problem in community property states such as Arizona and California.)
- B. Motor vehicle fees - conditional immunity.
  - 1. With respect to vehicles solely owned by the service member, nonresident service persons are immune from "licenses, fees, or excises" imposed by the duty state with respect to motor vehicles, but only if the service member has met the license, fee, and excise requirements of the state of domicile. (§ 574(2)(b)).
  - 2. In determining whether a charge assessed by the duty state is a personal property tax or a license, fee, or excise tax, look behind the label attached to the charge.
    - a) Sullivan v. United States, 395 U.S. 169 (1969). § 574 protects from annually recurring property taxes; use or excise tax is permissible.

- b) *California v. Buzard*, 382 U.S. 386 (1966). State barred from exacting a license fee based on percentage of auto's value. California's 2% tax not essential to registration and licensing vehicle.
  - c) *U.S. v. City of Highwood*, 712 F.Supp. 138 (N.D.Ill. 1989), motion to reconsider denied, 1989 WL 65043 (N.D.Ill. 9 June 1989) - SSCRA exempts nonresident service members from annual revenue raising vehicle fees of host state but not from licensing, fees, or excises essential to functioning and administration of licensing and registration laws.
  - d) *United States v. Wyoming*, 402 F.Supp. 229 (D.Wyo. 1975). Annual registration fee measured by value of vehicle raised revenues and was barred by SSCRA.
3. Pursuant to police powers, states can require compliance with pollution abatement and safety inspection laws even for motor vehicles not subject to state personal property tax and registration requirements.

C. House trailers and mobile homes.

- 1. Classification as real property v. personal property under federal law will determine taxation status.
  - a) *Snapp v. Neal*, 382 U.S. 397 (1966). State barred from exacting ad valorem tax on house trailer provided service member complies with laws of home state.
  - b) *United States v. Champaign Co. Ill.*, 525 F.2d 374 (7th Cir. 1975). SSCRA protection not limited to ad valorem taxes only, but also to annually recurring taxes based on location or situs of property (mobile homes).
  - c) *United States v. Illinois*, 387 F.Supp. 638 (E.D.Ill. 1975). Mobile home privilege tax barred regardless of whether home state taxes the property.

- d) United States v. Chester Co. Bd. of Assess. & Rev. of Taxes, 281 F.Supp. 1001 (E.D.Pa. 1968). Nonresident service members' house trailers not permanently affixed to ground were personal property exempt by SSCRA.
- e) Arizona Attorney General Opinion, Aug. 25, 1986 - Whether mobile home is real or personal property for purposes of SSCRA is question of federal law. It is personal if it retains characteristics of mobility.
- f) Virginia Attorney General Opinion, March 1, 1982 - Nonresident military member exempt from personal property tax on mobile home, though real estate upon which it sits is taxable by host state.
- g) Like a motor vehicle, a mobile home will receive **only conditional immunity** from licensing and fee requirements of the duty state.

## VII. CONCLUSION



# APPENDIX A

## WHAT IS THE DEFINITION OF “LEGAL RESIDENCE”?

By LTC Michael Brawley, Fort Sheridan Staff Judge Advocate

[Reprinted from the *Fort Sheridan Tower*, 28 February 1988, with permission of the author.]

Soldiers and their family members are often faced during an Army career with the difficult problem of determining where they have established their “legal residence,” also called “domicile.” Your legal residence very often controls where you must pay taxes or vote and where your children are entitled to in-state college tuition rates.

Part of the problem in dealing with “legal residence” and the privileges and obligations flowing therefrom stems from the use of inaccurate, ambiguous, and confusing terminology. The terms “residence,” “legal residence,” “domicile,” “resident,” “home of record,” “home state,” and “home” are often spoken interchangeably and inaccurately by tax bureaucrats, civilians, soldiers, and also used incorrectly in various legal documents that touch each soldier’s personal affairs everyday of his life. I will try to cut through the confusion and provide some clarification on the use of these terms and their legal significance for the soldier or family member.

“Legal residence” means that you are considered a citizen of that particular state. This status is normally acquired by your physical presence within the state, coupled with a desire to be a permanent legal resident, or citizen of that state, as evidenced by the acquisition of those indicators which demonstrate your intent, e.g., registering to vote, buying property, opening bank accounts in local banks, registering your car in the state, acquiring a state driver’s license, and paying state income taxes or personal property taxes.

Once acquired, your legal residence remains the same, even if you are moved to another state on military orders, until such time as you desire to, or circumstances, change it.

Suppose you grew up and always lived in California; that state would be your legal residence. If you move on military orders from your state of legal residence (California) to Illinois, you have the option of keeping California as your legal residence or adopting Illinois.

If you adopt Illinois as your new legal residence, you can enjoy the benefits of citizenship here (e.g., voting, no income tax on military pay), but you must also accept the burdens (e.g., changing your driver’s license and auto tags to Illinois, and losing California in-state tuition rates for your children’s college education).

You normally cannot have your cake and eat it too.

You cannot take the benefits here, and in California, and avoid the burdens in both places. That would be playing “fast and loose” and you could lose the benefits of both places.

One other thing you cannot do is adopt a state as your legal residence without ever being there. For example, if your legal residence was California and you PCS’d to Illinois, you could not adopt Florida as your legal residence just because it has no state income tax, if you never set foot in Florida.

Most state agencies dealing with you on contested tax issues, would reject your claim of Florida legal residence, unless you could demonstrate that you lived in Florida at sometime, and then could show that you made efforts to adopt Florida as your legal residence (see indicators above).

“Domicile” for all intents and purposes, means your legal residence. The two terms may be used interchangeably, however I recommend that you use “legal residence” rather than domicile because domicile is less well understood by the general public in common conversation.

“Residence” and “reside” are another pair of words you encounter frequently. Unless elaborated upon, these terms used alone are capable of causing considerable misunderstanding depending upon the perceptions of those who use them, and those who hear them.

In one usage, “residence” is a dwelling unit, such as a house. Someone who is talking about you “legal residence” can however, also use it. When questioned by someone using this term, always ask how the term is being used. The simple question, “Where do you reside?” can mean either “Where do you live right now?” or “Where is your legal residence?” It is essential to seek clarification when “residence” or “reside” are used because the connotations can have significant legal consequences for you. If you intend to refer to your legal residence, always use the modifier “legal” for clarity’s sake.

“Home of Record” (HOR) is a term of some military significance, but not necessarily any legal consequence. HOR is the place from which you were appointed, enlisted or ordered to active duty for military service. It is used by the Army to determine your maximum travel entitlement upon ETS. It could be the same place as your state of legal residence, but it need not be. Suppose you were attending school away from your state of legal residence, and you were commissioned in ROTC and ordered to active duty at that location. Your HOR for purposes of ordering you to active duty could be State College, Pennsylvania, even though you were a legal resident of California and still nurtured a burning desire to return to the Golden State.

As mentioned earlier, Army travel and transportation allowances are based upon HOR when separation from service occurs. Thus, if your HOR is State College, Pennsylvania, and you are going to ETS at Fort Devens, Massachusetts, Uncle Sam will not ship your household goods (HHG) to California for free or pay you travel for that distance. Your travel allowance limit would be the distance between Fort Devens and State College, Pennsylvania.

Once designated, the HOR is difficult to change for convenience of the soldier, i.e., to pay for transportation of HHG to a point beyond the distance from separation point to HOR is not allowed.

The term HOR is used interchangeably sometimes with "home" or "home state." The term "home" or "home state" depending upon the intent of the speaker, can mean a "house" or "legal residence," or merely the state from which you originally came.

Again, caution should be used when the words "home" or "home state" are being used. "Where is your home?" is a question as innocent or as loaded as the circumstances under which it is being asked may reflect.

The message here should be clear. Always take care when talking about or filling out documents **that refer to "residence", "home state", "resident of", "living at", "home", "domiciliary of", or "legal residence."**

Many times people ask what are the best indicators of legal residence? I think it safe to say that those indicators, which cost you something probably, demonstrate your intent to be a permanent legal resident of a state better than anything else does. For example, filing state tax returns and, when necessary, paying state income taxes, will go a long way in convincing *state* officials that you really do consider state X to be your legal residence. Voting in a particular state over an extended period, or a career, can also be convincing.

Of less consequence would be owning investment property in a state; and still less important would be maintaining bank accounts or CD's in a particular state.

The more indicators of permanent legal residence you established, which are consistent with an intent to return to particular state when you are separated from the military, the easier it will be to convince interested state authorities of the bone fide nature of your claim to citizenship or, as the case may be, to your denial of citizenship in a particular state.

An interesting sidelight is the status of the wife of a soldier. Under common law, and **still in some states** today, a woman's domicile or legal residence is considered to be that of her husband.

The women's liberation movement has made some in-roads into the archaic legal fiction that held that the wife *is* a "chattel" or "property" of the husband, however, the soldier's *wife* should *be* aware that this concept could be an issue for her at sometime *during* the soldier's career.

The spouse of a soldier should be aware that the protections of the Soldier's and Sailor's Civil Relief Act, ***do not*** shield the family members in all circumstances nearly as well as they do the soldier. For example, while a soldier can retain his home state driver's license *and* *auto* tags while stationed in a duty state, his spouse within a short time after arrival in the state, would normally have to change the tags on her car, *and* her driver's license over to the duty state where the soldier is stationed.

Another question frequently arises, namely that of re-establishing your legal residence in state X after you have changed it to state Y for some reason.

Can you simply retake your old legal residence when it is to your advantage to do so, or must you again have a physical presence within state X before you can again consider it to be your legal residence?

I can give no definite answer here. In most cases, no evidence of your change from state X to Y is likely to exist unless you vote in state Y or voluntarily file legal documents there, such as, tax returns.

If the validity of your change of legal residence is raised by state authorities, you may be required to show that you re-established legal residence via a new presence within state X and that you took actions which would be persuasive indicators of your true intention or re-establishing of citizenship there.'

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## JUDGE ADVOCATE OFFICER BASIC COURSE

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# **OUTLINE OF INSTRUCTION**

## **I. REFERENCES & RESOURCES**

- A. 8 U.S.C.A. §§ 1101-1105 (General Provisions); §§ 1151-61 (Immigration); §§ 1181-88 (Admission Qualifications); § 1201 (Issuance of Entry Documents), and §§ 1421-83 (Naturalization).
- B. 8 C.F.R., Chapter 1
- C. 22 C.F.R. Parts 41 & 42.
- D. Department of Defense Directive 5500.14, Naturalization of Aliens Serving in the Armed Forces of the United States and of Alien Spouses and/or Alien Adopted Children of Military and Civilian Personnel Ordered Overseas, 30 October 1970, w/C1 7 May 1997.
- E. Richard A. Boswell, Immigration & Nationality Law Cases & Materials (2d ed. 1992).
- F. Internet Resources:
  - 1. Dept. of State Consular Affairs Page -- [\*\*http://travel.state.gov\*\*](http://travel.state.gov)
  - 2. U.S. Embassy, Bonn, Germany --  
[\*\*http://www.usia.gov/posts/bonn.html\*\*](http://www.usia.gov/posts/bonn.html)
  - 3. Immigration & Naturalization Service Internet Home Page --  
[\*\*http://www.usdoj.gov/ins\*\*](http://www.usdoj.gov/ins)
  - 4. Siskind, Susser, Haas & Chang – Immigration & Nationality Law Page -- [\*\*http://www.visalaw.com\*\*](http://www.visalaw.com)

## **II. KEY DEFINITIONS**

- A. Alien. The term "alien" means any person not a citizen or national of the U.S. 8 U.S.C. § 1101(a)(3). This includes immigrants and legal and illegal nonimmigrants.



- B. Child. (8 U.S.C. § 1101(b)(1)) The term “child” means an unmarried person under twenty-one years of age who is--
1. a child born in wedlock;
  2. a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time of the marriage creating the status of stepchild;
  3. a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the U.S., if such legitimization takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimization;
  4. a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person, see generally, 8 U.S.C. 1409(c);
  5. a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years. Provided, that no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or
  6. a child, under the age of sixteen at the time a petition is filed in his behalf who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who
    - a) has been adopted abroad by a U.S. citizen and spouse jointly, or by an unmarried U.S. citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or

- b) is coming to the U.S. for adoption by a U.S. citizen and spouse jointly, or by an unmarried U.S. citizen at least twenty-five years of age, who have or has complied with the pre-adoption requirements, if any, of the child's proposed residence; and
  - c) the Attorney General is satisfied that proper care will be furnished the child if admitted to the U.S.; and
  - d) no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.
- C. National. The term "national" means a person owing permanent allegiance to a state. 8 U.S.C. § 1101(a)(21). The term "national of the U.S." means a citizen of the U.S., or a person who, though not a citizen of the U.S., owes permanent allegiance to the U.S. 8 U.S.C. § 1101(a)(22). Currently, the only noncitizen nationals of the U.S. are residents of American Samoa and Swains Island.
- D. Outlying Possessions. The term "outlying possessions of the United States" means American Samoa and Swains Island.
- E. Parent, Father, or Mother. A parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in the definition of "child" above. (NOTE: in certain circumstances, in cases of a child born out of wedlock, the term "parent" does not include the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.) 8 U.S.C. § 1101(b)(2)

### III. UNITED STATES CITIZENSHIP.

- 1. **By Birth.** The following are nationals and citizens of the U.S. at birth. 8 U.S.C. § 1401(a); *see also*, U.S. v. Wong Kim Ark, 169 U.S. 649 (1898), Civil Rights Act of 1866, U.S. CONST. Amend. XIV.
  - a) A person born in the U.S., and subject to the jurisdiction thereof.

- b) A person born in an outlying possession of the U.S. of parents one of whom is a citizen of the U.S. who has been physically present in the U.S. or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person.
- c) A person born outside of the U.S. and its outlying possessions of:
  - (1) Parents both of whom are citizens of the U.S. and one of whom has had a residence in the U.S. or one of its outlying possessions, prior to the birth of such person;
  - (2) Parents one of whom is a citizen of the U.S. who, prior to the birth of such person, has been physically present in the U.S. or one of its outlying possessions for a continuous period of one year, and the other of whom is a national, but not a citizen of the U.S.;
  - (3) Parents one of whom is a citizen of the U.S. who, prior to the birth of such person, was physically present in the U.S. or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years, and the other of whom is an alien.<sup>1</sup>

B. **By Naturalization.** The Attorney General has sole authority to naturalize persons as citizens of the U.S. 8 U.S.C. 1421.

- 1. An alien must obtain an immigrant visa and become a lawful permanent resident.
- 2. After the statutory period as a lawful permanent resident, they may apply and become naturalized.

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<sup>1</sup> Any periods of honorable service in the Armed Forces of the U.S., or periods of employment with the U.S. Government by the citizen parent, or any periods during which the citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the U.S., or (B) employed by the U.S. Government may be included in order to satisfy the physical-presence requirement. 8 U.S.C. 1401(g).

## **SECTION A: IMMIGRATION**

### **IV. ENTERING THE UNITED STATES**

- A. There are only three ways for an alien to legally enter the U.S.
  - 1. Visa.
  - 2. Parole.
  - 3. Asylum.
- B. Visas are granted to two general types of persons.
  - 1. NONIMMIGRANTS: persons who wish to enter the U.S. temporarily for a specific purpose.
  - 2. IMMIGRANTS: persons who wish to enter the U.S. for the purpose of staying permanently.
- C. Excludable Aliens: The following will exclude persons from entering the U.S. (8 U.S.C. § 1182).
  - 1. Health-related grounds, including those individuals:
    - a) Determined to have a communicable disease of public health significance, including infection with the etiologic agent for AIDS;
    - b) Seeking admission as an immigrant and who have failed to present documentation of having received vaccination against vaccine-preventable diseases;<sup>2</sup>

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<sup>2</sup> The statute lists the following as required vaccinations: mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B. Additionally, the statute authorizes the Advisory Committee for Immunization Practices to add required vaccines. These vaccinations are now documented on a vaccination appendix to Form I-693.

- c) Determined to:
  - (1) Have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others; or
  - (2) Have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior; or
  - (3) Are determined to be a drug abuser or addict.
- 2. Crime Related Grounds. Numerous grounds including prostitution within 10 years of applying for the visa, and drug trafficking.
- 3. Security Related Grounds. Espionage, Sabotage, Terrorism, etc.
- 4. Several Other specific categories including those likely to become public charges (wards of State), illegal entrant immigration violators, and those without proper documentation.

## **V. NONIMMIGRANT VISAS**

- A. Types of Nonimmigrant Visas
  - 1. Type A: Foreign government officials (diplomatic personnel)
  - 2. Type B: Visitors
  - 3. Type C: Immediate & Continuous transit through U.S.
  - 4. Type D: Crew members
  - 5. Type E: Treaty Traders or Investors
  - 6. Type F: Students

7. Type M: Vocational Students
8. Type G: Reps of or Employees of International organizations
9. Type H: Temporary Workers
10. Type I: Other Nonimmigrant Visas
11. Type J: Exchange Visitors
- 12. Type K: Fiancées of U.S. Citizens**
13. Type L: Intracompany transferees
14. Type M: Students in established Vocational or Other Nonacademic Institutions
15. Type N: Certain Parents and Children of Special Immigrants
16. Type O: Extraordinary Ability in Arts and Sciences
17. Type P: Athletes and Performing Artists
18. Type Q: International Cultural Exchange Programs
19. Type R: Religious Occupations
20. Type S: NATO Nonimmigrant Aliens
21. Type T: Alien Witnesses and Informants
- 22. Type V: Nonimmigrant Status for Certain Spouses and Children**

B. Nonimmigrant Visas for Fiancées of U.S. Citizens (K Visas).

1. An alien who is a fiancée of a citizen of the U.S. and who seeks to enter the U.S. solely to conclude a valid marriage with the petitioner within ninety days after entry, and the minor children of such fiancée, is considered a “nonimmigrant.” 8 U.S.C. § 1101(a)(15)(K).
2. Requirements.
  - a) Bona fide intention to marry within 90 days after admission to the U.S.

- b) Following the marriage, the fiancée may apply to have his or her status adjusted from K-1 to conditional permanent residence. Note that the residence will be conditional because the Immigration Marriage Fraud Amendments of 1986 apply to any marriage that was entered into less than 24 months prior to the granting of permanent residence status. See paragraph VII.D., below, on conditional permanent residence status.
  - c) Petitioner and fiancée must have met *IN PERSON* within the two-year period immediately preceding the filing of the nonimmigrant visa petition.
- C. Nonimmigrant Visas for Spouses of U.S. Citizens Waiting Abroad for Immigrant Visas (Expanded K Visas). Expanded K Visa status to include the spouse of a U.S. citizen who is waiting abroad for an immigrant visa and the spouse's children. The K Visa allows them to enter the U.S. as nonimmigrants and re-unite with their family while waiting approval of their immigrant visa.
- D. Nonimmigrant Visas for Certain Spouses and Minor Children of Lawful Permanent Residents (V Visas).
  - 1. Alien spouses and minor unmarried children (under 21 years of age) of a lawful permanent resident are allowed to reside and work in the U.S. while waiting to obtain immigrant status.
  - 2. Requirements.
    - a) Must have had a form filed with the INS on his or her behalf by the lawful permanent resident spouse or parent on or before December 21, 2000; and
    - b) Must have been waiting for at least three years after the Form I-130 was filed for their immigrant status – either because a visa number (priority date) has not yet become available, or because INS has not yet adjudicated the request.

## **VI. IMMIGRANT VISAS**

### **A. Immigrant Visas NOT Subject to Quotas (8 U.S.C. § 1151(b)).**

1. Immediate relatives, including the children, spouses, and parents of a U.S. citizen.
  - a) In the case of parents, the citizen child must be at least 21 years of age.
  - b) Spouses may use this provision after their sponsor citizen dies as long as:
    - (1) They were married for at least 2 years and not legally separated at the time of the citizen's death;
    - (2) The alien spouse files a petition for immigration within 2 years of the citizen spouse's death; and
    - (3) The spouse has not remarried.
2. Special immigrants. The term refers to a number of defined categories of people including-- (8 U.S.C. § 1101(a)(27))
  - a) An alien who has served honorably on active duty in the Armed Forces of the U.S. after October 15, 1978, and after original lawful enlistment outside the U.S. (under a treaty or agreement in effect on October 1, 1991) for a period or periods aggregating—
    - (1) 12 years and who, if separated from such service, was never separated except under honorable conditions; or
    - (2) 6 years, in the case of an immigrant who is on active duty at the time of seeking special immigrant status under this subparagraph and who has reenlisted to incur a total active duty service obligation of at least 12 years; and



- (3) the spouse or child of any such immigrant if accompanying or following to join the immigrant, but only if the executive department under which the immigrant serves or served recommends the granting of special immigrant status to the immigrant.

- b) This category applies to service members from the Philippines, Micronesia, and the Marshall Islands.

B. Immigrant Visas Subject to Quotas.

1. Family-based Immigrants - Divided into 4 preferences (8 U.S.C. § 1153(a)).

- a) *First Preference*: Unmarried sons/daughters of U.S. Citizens.
  - (1) Limited to 23,400 per year.
  - (2) As a practical matter, will be 21 or older since those under 21 enter as “immediate relatives,” a category for which there is no quota.
- b) *Second Preference*: Spouse and unmarried sons and daughters of lawful permanent residents. Limited to 114,200 per year plus those allocations not used by immediate relatives and under the First Preference above. **NOTE:** See, paragraph V.C., above, for INS rules implementing the V nonimmigrant Visa provisions allowing spouses and unmarried sons and daughters of lawful permanent residents to enter the country in a nonimmigrant status.
- c) *Third Preference*: Married sons and daughters of U.S. Citizens. Allocated 23,400 visas per year plus whatever is not used by the First and Second Preferences.
- d) *Fourth Preference*: Brothers & Sisters of U.S. Citizens. Allocated 65,000 visas plus whatever allocations are not used by the first three categories.

2. Employment-based Immigrants (8 U.S.C. § 1153(b))
3. Diversity-based Immigrants (8 U.S.C. § 1153(c)).

## VII. OBTAINING A VISA (8 C.F.R. § 204)

- A. Petition for Visa. The citizen relative must file a petition for a Visa.
  1. Supporting documentation. Documents that establish the U.S. citizenship or lawful permanent resident status of the petitioner and the claimed relationship of the petitioner to the beneficiary. See, Appendix B, Step 1.
    - a) ***Special Allowance for Members of the Armed Forces (8 CFR 204.1(g)(2)(v))***: If it would cause unusual delay or hardship to obtain documentary proof of birth in the U.S., a U.S. citizen petitioner who is a member of the U.S. Armed Forces serving outside the U.S. may submit a statement from the appropriate authority of the Armed Forces. The statement should attest to the fact that the personnel records of the Armed Forces show that the petitioner was born in the U.S. on a certain date.
    - b) Marriage. Watch for “Sham” Marriages. A sham marriage is one entered into to confer an immigration benefit. There is a *presumption* that the marriage is a sham if it is entered into within two years of immigration, AND dissolved within two years of arrival. 8 U.S.C.A. § 1227(a)(1)(G)(i).
  2. Approval Authority. INS decides to approve or deny the petition. The INS may conduct a further investigation prior to deciding.
  3. Appeal. Appeals may be filed within 30 days of the denial of the petition through the servicing INS office to the Board of Immigration Appeals.
- B. Visa Filing and Processing

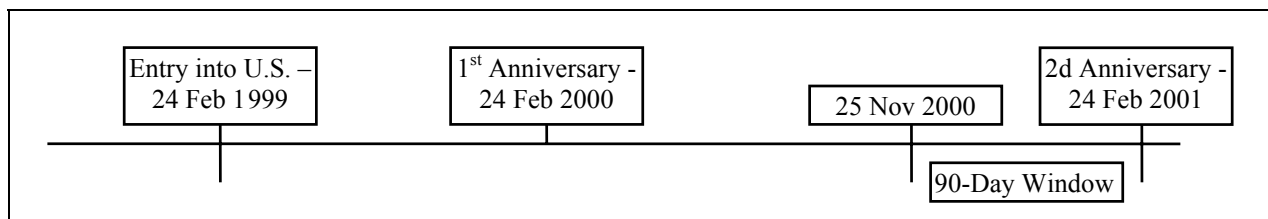
1. Approved petitions are sent to the Department of State Visa Processing Center. Approval of the petition does NOT relieve the alien of the burden of showing they are eligible for a visa.
2. Once the petition is approved, the alien must file an Application for Immigrant Visa and Alien Registration. The immigrant is then interviewed by a consular officer who must determine on the basis of the applicant's representations and the visa application and other relevant documentation, the applicant's eligibility to receive a visa.
3. Supporting Documentation. See, Appendix B, Step 2.
4. Affidavit of Support. (8 CFR 213a) Generally, each application for an immigrant visa for status as an immediate relative, family-based immigrant, or employment-based immigrant must contain an Affidavit of Support, Form I-864, executed by a sponsor.
  - a) The sponsor must demonstrate the means to maintain an annual income of at least 125% of the Federal Poverty line. If the sponsor is on active duty in the Armed Forces and the intending immigrant is the sponsor's spouse or child, the sponsor's income must equal at least 100% of the Federal Poverty line.
  - b) Execution of the Affidavit of Support creates a contract between the sponsor and the U.S. Government for the benefit of the immigrant, and of any Federal, State, or local governmental agency or private entity that administers any means-tested public benefits program. The sponsored immigrant, or any Federal, state, or local governmental agency or private entity that provides means-tested public benefits to the sponsored immigrant after the sponsored immigrant acquires permanent resident status, may seek enforcement of the sponsor's obligations through an appropriate civil action.
  - c) Termination of support obligation. The sponsor's support obligation terminates by operation of law when the sponsored immigrant:
    - (1) Becomes a U.S. citizen;

- (2) Has worked, or can be credited with, 40 qualifying quarters of work; provided that the sponsored immigrant is not credited with any quarter beginning after December 31, 1996, during which he or she received any Federal means-tested public benefit;
  - (3) Ceases to hold the status of an alien lawfully admitted for permanent residence and has departed the U.S.; or
  - (4) Dies.
- 5. Medical examination. Every alien must undergo a medical examination by a physician selected from a panel approved by the consular officer.
- 6. The alien applicant must appear before a consular office to execute the application and must then be interviewed by a consular officer. The consular officer will then decide the applicant's eligibility for a visa.
- 7. **Visa is issued!** It is only good for 4 months, renewable only upon a showing that it was not used for reasons beyond the beneficiary's control.
- C. Permanent Resident Status. 8 U.S.C. § 1186a. Generally, the immigrant will receive full permanent resident status upon arrival in the U.S.
- D. Conditional Status. If the marriage occurred within 24 months of immigrating, the permanent resident status of the alien spouse is issued on a conditional basis. Time in conditional status DOES count toward time requirements for naturalization. Any children that are immigrating based upon a qualification derivative from a marriage that occurred within 24 months will also receive their status on a conditional basis.

1. Notice of Removal of Conditional Status. 8 U.S.C.A. § 1186a; 8 C.F.R. Part 216. Generally, the alien spouse will receive notice of the requirement to petition for removal of conditional status. Failure of the Service to provide a notice does not affect enforcement of the conditional status.
2. Termination of conditional status if finding that qualifying marriage improper (8 CFR 216.3(b)). If, before the second anniversary of the alien's obtaining conditional status, the Service finds that the qualifying marriage --
  - a) Was entered into for the purpose of procuring an alien's entry as an immigrant; or
  - b) Has been judicially annulled or terminated, other than through the death of a spouse; or
  - c) A fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition with respect to the alien.

The Service must notify the parties involved and, subject to a hearing, will terminate the permanent resident status of the alien (or aliens) involved as of the date of the determination.

3. The Petition. The immigrant spouse and the petitioning spouse must submit a petition requesting the removal of the conditional basis and which states the following, under penalty of perjury.
4. Period for filing petition.



- a) The petition must be filed during the 90-day period before the second anniversary of the alien obtaining the status of lawful admission for permanent residence.
  - b) Date of petitions for good cause. A late petition may be considered if filed after the 90-day period, but only if the alien establishes to the satisfaction of the Service good cause and extenuating circumstances for failure to file.
- 5. The alien spouse and the petitioning spouse (if not deceased) must appear for a personal interview before an officer or employee of the Service, unless waived. The interview must be conducted within 90 days after the date of submitting the petition.
- 6. Termination of permanent resident status for failure to file petition or have personal interview. The Attorney General will terminate the permanent resident status of the alien as of the second anniversary of the alien's lawful admission for permanent residence if no petition is filed with respect to the alien, or the alien spouse and petitioning spouse fail to appear at the interview, unless good cause is shown.
- 7. Determination after petition and interview.
  - a) The Attorney General will determine, within 90 days of the date of the interview, whether the facts and information described in the petition are true with respect to the qualifying marriage.
  - b) If the Attorney General determines that such facts and information are true, the Attorney General will notify the parties involved and remove the conditional basis of the parties effective as of the second anniversary of the alien's obtaining the status of lawful admission for permanent residence.
  - c) If the Attorney General determines that such facts and information are not true, the Attorney General will notify the parties involved and terminate the permanent resident status of an alien spouse or an alien son or daughter as of the date of the determination.

d) Any alien whose permanent resident status is terminated may request a review in a proceeding to deport the alien.

(1) The burden of proof is on the Attorney General to establish that the facts and information alleged in the petition are not true with respect to the qualifying marriage.

(2) Standard is a preponderance of the evidence.

8. Hardship waiver (8 CFR 216.5). The Attorney General, in his discretion, may remove the conditional basis of the permanent resident status of an alien who fails to meet the requirements if the alien demonstrates that--

a) Extreme hardship would result if the alien is deported; or

b) The qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault; or

c) The qualifying marriage was entered into in good faith by the alien spouse and during the marriage the alien spouse or child was battered by or was the subject of extreme cruelty perpetrated by his or her spouse or citizen or permanent resident parent and the alien was not at fault in failing to meet the requirements.

In determining extreme hardship, the Attorney General considers circumstances occurring **ONLY** during the period that the alien was admitted for permanent residence on a conditional basis.

## **SECTION B: NATURALIZATION**

### **VIII. NATURALIZATION OVERVIEW**

#### **A. Eligibility. (8 U.S.C. 1427; 8 C.F.R. § 316.2)**

1. General. To be eligible for naturalization, an alien must establish that he or she:
  - a) Is at least 18 years of age;
  - b) Has been lawfully admitted as a permanent resident of the U.S.;
  - c) Has resided continuously within the U.S. for a period of at least five years after having been lawfully admitted for permanent residence.
    - (1) Generally, an alien's residence and domicile or principal actual dwelling place are the same, and the duration of an alien's residence in a particular location is measured from the moment the alien first establishes residence in that location.<sup>3</sup>
    - (2) Military personnel (8 CFR 316.5(b)). For applicants who are serving in the Armed Forces of the U.S. but who do not qualify for naturalization as described in paragraph IX.B., below, the applicant's residence is:
      - (a) The State or Service District where the applicant is physically present for at least three months, immediately preceding the filing of an application for naturalization; or

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<sup>3</sup> If an applicant claims residence in more than one State, the residence will be determined by reference to the location from which the annual federal income tax returns have been and are being filed.



- (b) The location of the residence of the applicant's spouse and/or minor child(ren);  
or
  - (c) The applicant's home of record as declared to the Armed Forces at the time of enlistment and as currently reflected in the applicant's military personnel file.
- d) Has been physically present in the U.S. for at least 30 months of the five years preceding the date of filing the application;
- e) Immediately preceding the filing of an application has resided for at least three months in a State or Service district having jurisdiction over the applicant's actual place of residence, and in which the alien seeks to file the application;
- f) Has resided continuously within the U.S. from the date of application for naturalization up to the time of admission to citizenship;

- g) For all relevant time periods above, has been and continues to be a person of good moral character;<sup>4</sup>
- h) Is attached to the principles of the Constitution of the U.S., and favorably disposed toward the good order and happiness of the U.S. (8 C.F.R. § 316.11) At a minimum, the applicant must satisfy the general standard of this requirement by demonstrating:

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<sup>4</sup> Good moral character. (8 C.F.R. § 316.10). Includes the period between the examination and the administration of the oath of allegiance. The Service evaluates claims of good moral character on a case-by-case basis. The Service is not limited to reviewing the applicant's conduct during the five years immediately preceding the filing of the application, but may take into consideration the applicant's conduct and acts at any time prior to that period. An applicant lacks good moral character if the applicant has been convicted of murder at any time or convicted of an aggravated felony on or after November 29, 1990.

In addition, an applicant lacks good moral character if, during the statutory period, the applicant committed one or more crimes involving moral turpitude, other than a purely political offense, for which the applicant was convicted, or committed two or more offenses for which the applicant was convicted and the aggregate sentence actually imposed was five years or more, provided that, if the offense was committed outside the U.S., it was not a purely political offense; violated any law of the U.S., any State, or any foreign country relating to a controlled substance, provided that the violation was not a single offense for simple possession of 30 grams or less of marijuana; admits committing any criminal act above for which there was never a formal charge, indictment, arrest, or conviction, whether committed in the U.S. or any other country; is or was confined to a penal institution for an aggregate of 180 days pursuant to a conviction or convictions (provided that such confinement was not outside the U.S. due to a conviction outside the U.S. for a purely political offense); has given false testimony to obtain any benefit from the Immigration Act, if the testimony was made under oath or affirmation and with an intent to obtain an immigration benefit; is or was involved in prostitution or commercialized vice; is or was involved in the smuggling of a person or persons into the U.S.; has practiced or is practicing polygamy; committed two or more gambling offenses for which the applicant was convicted; earns his or her income principally from illegal gambling activities; or is a habitual drunkard.

Unless the applicant establishes extenuating circumstances, the applicant will be found to lack good moral character if, during the statutory period, the applicant: willfully failed or refused to support dependents; had an extramarital affair which tended to destroy an existing marriage; or committed unlawful acts that adversely reflect upon the applicant's moral character, or was convicted or imprisoned for such acts, although the acts do not fall within those described above.

Proof of good moral character in certain cases. Probation or parole during the statutory period does not preclude establishing good moral character, but the Service may consider such probation, parole, or suspended sentence in determining good moral character. An application will not be approved until after the probation, parole, or suspended sentence has been completed. Where an applicant has had his or her record expunged relating to one of the narcotics offenses, the applicant is considered as having been "convicted" or, if confined, as having been confined as a result of "conviction." Moreover, an applicant who has committed or admits the commission of two or more crimes involving moral turpitude during the statutory period is precluded from establishing good moral character, even though the conviction record of one such offense has been expunged.

- (1) An acceptance of the democratic, representational process established by the Constitution;
- (2) A willingness to obey the laws which may result from that process; and
- (3) An understanding of the means for change that are prescribed by the Constitution.
- (4) An applicant who is or has been a member of or affiliated with the Communist Party or any other totalitarian organization is ineligible for naturalization, unless the applicant's membership meets exceptions discussed in the CFR. (8 C.F.R. 313)
- i) Is not a deserter of the U.S. Armed Forces or has not departed from the U.S. to evade military service in the U.S. Armed Forces. (8 C.F.R. § 314).

- 2. Burden of proof. The applicant bears the burden of establishing by a preponderance of the evidence that he or she meets all of the requirements for naturalization.

## B. General Requirements to Naturalize.

- 1. Literacy requirements. (8 C.F.R. § 312.1)
  - a) General. To be naturalized, a person must demonstrate an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language.
  - b) Exceptions.
    - (1) A person who, on the date of filing of his or her application for naturalization, is over 50 years of age and has been living in the U.S. for periods totaling at least 20 years subsequent to a lawful admission for permanent residence;

- (2) A person who, on the date of filing his or her application for naturalization, is over 55 years of age and has been living in the U.S. for periods totaling at least 15 years subsequent to a lawful admission for permanent residence; or
- (3) A person who is physically unable to comply with the literacy requirements due to a permanent disability such as blindness or deafness. A person who has a general incapacity to learn either because of developmental disability or advanced age may not ordinarily be considered to be physically unable to comply with the literacy requirements.

c) Literacy examination.

- (1) Verbal Skills. The ability of an applicant to speak English is determined by a designated examiner from the applicant's answers to questions normally asked in the course of the examination.
- (2) Reading and writing skills. Generally, an applicant's ability to read and write English is tested using excerpts from one or more parts of the Service authorized Federal Textbooks on Citizenship written at the elementary literacy level.<sup>5</sup>

2. Knowledge of history and government of the U.S. (8 C.F.R. § 312.2). The examination of an applicant's knowledge of the history and form of government of the U.S. is given orally by a designated examiner in the English language, unless.<sup>6</sup>

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<sup>5</sup> Service publications M-289 and M-291. These textbooks may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402, and are available at certain public educational institutions. An applicant's writing sample shall be retained in the applicant's Service file.

<sup>6</sup> Scope and substance. The scope of the examination is limited to subject matters covered in the Service authorized Federal Textbooks on Citizenship except for the identity of current officeholders. In choosing the subject matters, in phrasing questions, and in evaluating responses, consideration is given to the applicant's education, background, age, length of residence in the U.S., opportunities available and efforts made to acquire the requisite knowledge, and any other elements or factors relevant to an appraisal of the adequacy of the applicant's knowledge and understanding.

- a) The applicant is exempt from the English literacy requirement, in which case the examination may be conducted in the applicant's native language with the assistance of an interpreter, but only if the applicant's command of spoken English is insufficient to conduct a valid examination in English; or
- b) The applicant has satisfied the English literacy requirement, but the officer conducting the examination determines that an inaccurate or incomplete record of the examination would result if the examination on technical or complex issues were conducted in English. In such a case the examination may be conducted in the applicant's native language, with the assistance of an interpreter; or
- c) The applicant has past a standardized citizenship test given by an authorized entity within one year preceding the date on which he or she files a naturalization application, or at any time subsequent to filing an application but prior to a final determination.

## **IX. NATURALIZATION CATEGORIES SEEN BY MILITARY PRACTITIONERS**

### **A. Persons With Three Years Service In The Armed Forces Of The U.S. (8 CFR § 328.1)**

#### **1. Definitions.**

- a) “Honorable service” means military service designated as honorable service. Any service that is designated to be other than honorable will not qualify.
- b) “Service in the Armed Forces of the U.S.” means:
  - (1) Active or reserve service in the U.S. Army, U.S. Navy, U.S. Marines, U.S. Air Force, or U.S. Coast Guard; or
  - (2) Service in a National Guard unit during such time as the unit is federally recognized as a reserve component of the Armed Forces of the U.S.

2. Eligibility Requirements. (8 C.F.R. § 328.2) An applicant must establish that he or she:
- a) Has served honorably in and, if separated, has been separated honorably from, the Armed Forces of the U.S.;
  - b) Has served for a period of three or more years, whether that service is continuous or discontinuous;
  - c) Is a lawful permanent resident of the U.S. at the time of the examination on the application;
  - d) Has been, during any period within five years preceding the filing of the application for naturalization, and continues to be, of good moral character, attached to the principles of the Constitution of the U.S., and favorably disposed toward the good order and happiness of the U.S.
- (1) An applicant is presumed to satisfy these requirements during periods of honorable service.
  - (2) An applicant must establish that he or she satisfies the requirements from the date of discharge from the military until the date of admission to citizenship.
  - (3) An applicant whose honorable service is discontinuous must also demonstrate that he or she satisfies the requirements for those periods of time when that applicant is not in honorable service.
  - (4) Applicant has complied with all other requirements for naturalization, except that:

- (a) An applicant who files an application for naturalization while still in honorable service, or within six months after termination of such service, is generally not required to satisfy the residence requirements. However, if the applicant's military service is discontinuous, that applicant must establish, for periods between honorable service during the five years immediately preceding the date of filing the application, that he or she resided in the U.S. and in the State or Service district in the U.S. in which the application is filed.
- (b) An applicant who files an application for naturalization more than six months after terminating honorable service must satisfy the residence requirements. However, any honorable service by the applicant within the five years immediately preceding the date of filing of the application shall be considered as residence within the U.S.
- e) Service duration exceptions for service during military hostilities. (*See* 8 U.S.C. 1440, 8 C.F.R. 329, includes service in WWI, WWII, the Korean War, Vietnam, and Operation Desert Shield/Storm).

B. Family Members.

- 1. Persons living in marital union with U.S. citizen spouse. (8 C.F.R. § 319.1)
  - a) To be eligible for naturalization, the spouse of a U.S. citizen must establish that he or she:
    - (1) Has been lawfully admitted for permanent residence to the U.S.;

- (2) Has resided continuously within the U.S. for a period of at least three years after having been lawfully admitted for permanent residence;
- (3) Has been living in marital union with the citizen spouse for the three years preceding the date of examination on the application, and the spouse has been a U.S. citizen for the duration of that three year period;<sup>7</sup>
- (4) Has been physically present in the U.S. for periods totaling at least 18 months. In the event that the alien spouse has never been in the U.S., eligibility is not established even though the alien spouse resided abroad in marital union with the citizen spouse during the 3-year period;
- (5) Has resided for at least 3 months immediately preceding the filing of the application in the State or Service district having jurisdiction over the alien's actual place of residence and in which the alien has filed the application;
- (6) Has resided continuously within the U.S. from the date of application for naturalization until the time of admission to citizenship;

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<sup>7</sup> Marital union. An applicant lives in marital union with a citizen spouse if the applicant actually resides with his or her current spouse. The burden is on the applicant to establish, in each individual case, that a particular marital union satisfies the requirements.

Loss of Marital Union. A person is ineligible for naturalization as the spouse of a U.S. citizen if, before or after the filing of the application, the marital union ceases to exist due to death or divorce, or the citizen spouse has expatriated. Additionally, any legal separation will break the continuity of the marital union. Informal separation. Any informal separation that suggests the possibility of marital disunity is evaluated on a case-by-case basis to determine whether it is sufficient to signify the dissolution of the marital union. If the applicant and spouse live apart because of circumstances beyond their control, such as military service in the Armed Forces of the U.S., the resulting separation, even if prolonged, will not preclude naturalization.



- (7) For all relevant periods, has been and continues to be a person of good moral character, attached to the principles of the Constitution of the U.S., and favorably disposed toward the good order and happiness of the U.S.; and
  - (8) Has complied with all other requirements for naturalization.
- b) Spouse Employed Abroad. If the citizen spouse will be employed abroad, the petitioner must meet all of the above requirements, plus the following.
- (1) Submit a statement of intent containing information about the citizen spouse's employment and the applicant's intent following naturalization.<sup>8</sup>
  - (2) If the applicant is a military spouse and the servicemember spouse is assigned overseas, the alien spouse must demonstrate that he or she will depart the U.S. to join the servicemember spouse within 30-45 days of naturalization.

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<sup>8</sup> The statement must contain: (1) name of the employer and the nature of the employer's business, or the ministerial, religious, or missionary activity in which the employer is engaged; (2) whether the employing entity is owned in whole or in part by United States interests; (3) whether the employing entity is engaged in whole or in part in the development of the foreign trade and commerce of the United States; (4) the nature of the activity in which the citizen spouse is engaged; (5) the anticipated period of employment abroad; (6) whether the alien spouse intends to reside abroad with the citizen spouse; and (7) whether the alien spouse intends to take up residence within the United States immediately upon the termination of such employment abroad of the citizen spouse.

- (a) Command-Sponsored. If the military is to pay the transportation expenses abroad for the alien spouse, the spouse must submit a properly executed Certificate of Overseas Assignment to Support Application to File Petition for Naturalization, DD Form 1278 issued more than 90 days in advance of departure is unacceptable.
  - (b) Non-command sponsored. If the alien spouse is not authorized to travel abroad at military expense, the alien spouse must submit a copy of the citizen spouse's military travel orders, a letter from the citizen spouse's commanding officer indicating that the military has no objection to the applicant traveling to and residing in the vicinity of the citizen spouse's new duty station; and evidence of transportation arrangements to the new duty station.
- 2. A surviving spouses of a U.S. citizens who died during a period of honorable service in an active duty status in the Armed Forces of the U.S. is eligible for naturalization, even if the surviving spouse remarries, if the spouse establishes the following. (8 C.F.R. § 319.3)
  - a) The citizen spouse died during a period of honorable service in an active duty status in the Armed Forces of the U.S.;
  - b) The spouse was living in marital union with the citizen spouse at the time of the military spouse's death;
  - c) At the time of examination on the application for naturalization, the spouse resided in the U.S. pursuant to a lawful admission for permanent residence;
  - d) The spouse is of good moral character, attached to the principles of the Constitution of the U.S., and favorably disposed toward the good order and happiness of the U.S.; and

- e) The spouse complies with all other requirements for naturalization.
- 3. Child of a U.S. Citizen (8 U.S.C. § 1431 and 1432, 8 C.F.R. § 322.2).
  - a) General Eligibility. A child on whose behalf an application for naturalization has been filed by a parent who is, at the time of filing, a citizen of the U.S., must:
    - (1) Be unmarried and under 18 years of age, both at the time of application and at the time of admission to citizenship;
    - (2) Reside permanently in the U.S., in the physical and legal custody of the applying citizen parent, pursuant to a lawful admission for permanent residence;
    - (3) Be a person of good moral character, attached to the principles of the Constitution of the U.S., and favorably disposed toward the good order and happiness of the U.S. **NOTE:** a child under the age of fourteen will generally be presumed to satisfy this requirement; and
    - (4) Comply with all other requirements for naturalization.<sup>9</sup>
  - b) Application: Follow normal procedures except: (8 C.F.R. §§ 322.4 & 322.5)
    - (1) The application must be accompanied by proof of:

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<sup>9</sup> The child is not required to satisfy the residence requirements under 8 CFR § 316.2 (a)(3), (a)(4), (a)(5), or (a)(6), as stated in paragraphs VIII.A.1.(c), (d), (e), and (f) and the child is exempt from the literacy and knowledge requirements.

- (a) The child's admission for lawful permanent residence;
  - (b) The applying citizen parent's U.S. citizenship; and
  - (c) The relationship between the child and applying citizen parent.
- (2) In the case of a citizen parent stationed abroad with the Armed Forces of the U.S., a properly executed DD Form 1278, Certificate of Overseas Assignment to Support Application to File Petition for Naturalization, must be submitted.
- (3) The child ***and*** the citizen parent must both appear at the examination on the application.
- (4) Oath of Allegiance.
  - (a) A child must take the oath of allegiance if the child is capable of understanding the meaning of the oath.
  - (b) If the child is not exempt from the requirement to take the oath of allegiance, the citizen parent must be present at the oath taking ceremony, unless excused for good cause.

## **X. NATURALIZATION PROCEDURES**

- A. Jurisdiction. (8 C.F.R. § 316.3 ) Generally, the applicant must file an application for naturalization with the Service office having jurisdiction over the applicant's residence at the time of filing the application. (*See* 8 C.F.R. § 100.4)

1. In the case of a citizen parent applying on behalf of a child, the application must be filed with the office of the Service having jurisdiction over the place of residence of the child and the child's citizen parent. (8 C.F.R. § 322.3)
  2. Persons with Three Years Service in the Armed Forces (8 C.F.R. § 328.3). The application is filed with the INS Nebraska Service Center. *See*, Appendix C for detailed instructions.
- B. Filing the Application. An application for naturalization may be filed up to 90 days prior to the completion of the required period of residence.
- C. Adjudication of the Application.
1. Investigation of applicant. (8 C.F.R. § 335.1) After the application is filed, the Service must conduct an investigation of the applicant, unless waived by the district director. The investigation consists of:
    - a) A review of all pertinent records;
    - b) Police department checks; and
    - c) A neighborhood investigation in the vicinities where the applicant has resided and has been employed, or engaged in business, for at least the five years immediately preceding the filing of the application.
  2. Examination of applicant. (8 C.F.R. § 335.2)
    - a) General.
      - (1) After the application is filed, each applicant must appear in person before a Service officer designated to conduct examinations (8 C.F.R. § 332.1).
      - (2) The examination is uniform throughout the U.S. and encompasses all factors relating to the applicant's eligibility for naturalization.

- (3) The applicant may request the presence of an attorney or representative who has filed an appearance in accordance with 8 C.F.R. Part 292.
- b) Procedure.
  - (1) The applicant is questioned, under oath or affirmation, in a setting apart from the public.
  - (2) The Service officer is required to maintain, for the record, brief notations of the examination for naturalization. At a minimum, the notations must include a record of the test administered to the applicant on English literacy and basic knowledge of the history and government of the U.S. The Service officer may have a stenographic, mechanical, electronic, or videotaped transcript made, or may prepare an affidavit covering the testimony of the applicant.
- c) Witnesses. Witnesses, if called, are questioned under oath or affirmation to establish their own credibility and competency, as well as the extent of their personal knowledge of the applicant and his or her qualifications to become a naturalized citizen.
  - (1) Subpoenas. The examining officer may issue subpoenas requiring the attendance of witnesses or the production of documentary evidence, or both, upon his or her own volition, or upon written request of the applicant or his or her attorney or representative.
  - (2) Witness fees. Mileage and fees are paid by the party at whose instance the subpoena is issued. Before issuing a subpoena, the officer may require a deposit of an amount adequate to cover the fees and mileage involved.
- d) Record of Examination.

- (1) At the conclusion of the examination, all corrections made on the application form and all supplemental material is consecutively numbered and listed in the space provided on the applicant's affidavit. The applicant then subscribed and swears to, or affirms, the affidavit and the Service officer signs it.
- (2) Evidence received by the officer is placed into the record for determination of the case.
- (3) A deposition or statement taken by a Service officer during the initial examination or any subsequent examination is included as part of the record.

3. Failure to appear for examination. (8 C.F.R. § 335.6)

- a) An applicant for naturalization is deemed to have abandoned his or her application if he or she fails to appear for the examination and to notify the Service of the reason for non-appearance within 30 days of the scheduled examination.
- b) The notification must be in writing and contain a request for rescheduling of the examination. In the absence of a timely notification, the Service may administratively close the application without making a decision on the merits.
- c) An applicant may reopen an administratively closed application by submitting a written request to the Service within one year from the date the application was closed.
- d) If the applicant does not request reopening of an administratively closed application within the time prescribed, the Service will consider that application to be abandoned, and will dismiss the application without further notice to the applicant.

4. Determination on application; continuance of examination. (8 C.F.R. § 335.3)

- a) Subject to supervisory review, the Service officer who conducts the examination determines whether to grant or deny the application, and is required to provide reasons for the determination. (8 C.F.R. § 316.14)
- b) A decision to grant or deny the application must be made at the time of the initial examination or within 120-days after the date of the initial examination.
- c) The applicant is notified that the application has been granted or denied and, if the application has been granted, of the procedures for the administration of the oath of allegiance.
- d) The Service officer may continue the initial examination on an application for one reexamination, to afford the applicant an opportunity to overcome deficiencies on the application that may arise during the examination.<sup>10</sup>

5. Denial After Examination. (8 C.F.R. § 336.1)

- a) The Service must serve a written notice of denial on an applicant for naturalization no later than 120 days after the date of the applicant's first examination on the application.
- b) A notice of denial is prepared in a written, narrative format, and contains the following information:
  - (1) The pertinent facts upon which the determination was based;
  - (2) The specific legal section or sections applicable to the finding of ineligibility; and
  - (3) The conclusions of law reached by the examining officer in rendering the decision.

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<sup>10</sup> The officer must inform the applicant in writing of the grounds to be overcome or the evidence to be submitted. The applicant is not required to appear for a reexamination earlier than 60 days after the first examination. The reexamination on the continued case will be scheduled within the 120-day period after the initial examination.



- c) The notice of denial must also contain a specific statement of the applicant's right either to accept the determination of the examining officer, or request a hearing before an immigration officer.
  - d) Service of the notice of denial may be made in person or by certified mail to the applicant's last known address, or upon the attorney or representative of record.
6. Appeal: Hearing before an immigration officer. (8 C.F.R. § 336.2)
- a) The applicant, or his or her authorized representative, may request a hearing on the denial by filing a request with the Service within 30 days after the applicant receives the notice of denial.
  - b) Upon receipt of a timely request for a hearing, the Service must schedule a review hearing before an immigration officer, within a reasonable period of time not to exceed 180 days from the date upon which the appeal is filed.
  - c) The review is with an officer other than the officer who conducted the original examination or who rendered the Service determination upon which the hearing is based, and who is classified at a grade level equal to or higher than the grade of the examining officer.
  - d) The reviewing officer has the authority and discretion to:
    - (1) Review the application for naturalization;
    - (2) Examine the applicant;
    - (3) Either to affirm the findings and determination of the original examining officer or to redetermine the original decision of the Service in whole or in part;
    - (4) Review any administrative record that was created as part of the examination procedures as well as Service files and reports; and

- (5) Receive new evidence or take such additional testimony as may be deemed relevant to the applicant's eligibility for naturalization or which the applicant seeks to provide.

e) Improperly filed request for hearing.

- (1) A request for hearing filed by a person or entity not entitled to file will be rejected without refunding the filing fee. A request for hearing filed by a person or entity who is not entitled to file such a request is rejected as improperly filed.
- (2) Untimely request for hearing. A request for hearing which is not filed within the time period allowed must be rejected as improperly filed. In such a case, any filing fee that the Service has accepted will not be refunded.

D. Judicial review of denial determinations on applications for naturalization. (8 C.F.R. § 336.9 & Part 310)

1. Filing a petition for review. Filed in the U.S. District Court having jurisdiction over his or her place of residence within a period of not more than 120 days after the Service's final determination.
2. Standard of review. The review will be *de novo*, and the court will make its own findings of fact and conclusions of law. The court may also conduct, at the request of the petitioner, a hearing *de novo* on the application for naturalization.
3. Exhaustion of remedies. A Service determination denying an application for naturalization is not subject to judicial review until the applicant has exhausted all administrative remedies.

E. Oath of allegiance. (8 C.F.R. § 337.1)

1. Form of oath. An applicant for naturalization must, before being admitted to citizenship, take in a public ceremony held within the U.S. the following oath of allegiance, to a copy of which the applicant shall affix his or her signature:

*I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the U.S. of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the U.S. when required by the law; that I will perform noncombatant service in the Armed Forces of the U.S. when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.*

2. Affirmation in lieu of oath. When a petitioner or applicant for naturalization, by reason of religious training and belief (or individual interpretation thereof), or for other reasons of good conscience, cannot take the oath prescribed with the words "on oath" and "so help me God" included, the words "and solemnly affirm" are substituted for the words "on oath," the words "so help me God" are deleted, and the oath is taken in modified form.
  3. The oath is taken in person at a Public ceremony held at a time and place designated by the Service or the Executive Office for Immigration Review within the U.S. and within the jurisdiction where the application for naturalization was filed. (8 C.F.R. § 337.2).
  4. An applicant who fails to appear without good cause for more than one oath administration ceremony for which he or she was duly notified is presumed to have abandoned his or her intent to be naturalized. (8 C.F.R. § 337.10)
- F. Certificate of Naturalization. When an applicant for naturalization has taken and subscribed to the oath of allegiance a Certificate of Naturalization, Form N-550, is issued by the Service at the conclusion of the oath administration ceremony. (8 C.F.R. § 338.1)
- G. Effective date of naturalization. (8 C.F.R. § 337.9)
1. An applicant is deemed a citizen of the U.S. as of the date on which the applicant takes the prescribed oath of allegiance.

2. When the taking of the oath is waived for a child, the child is deemed a citizen of the U.S. as of the date upon the Service granted the waiver. The appearance of the child and the child's parent(s) at an oath ceremony, if the oath is waived, is not required.

## APPENDIX A

<b><i>FILING FEES FOR SELECT INS FORMS</i></b> 8 C.F.R. § 103.7 Current as of 31 Dec 2001		
<b>Form #</b>	<b>Form Title</b>	<b>Fee<sup>1</sup></b>
I-129F	Petition for Alien Fiance(e)	\$110
I-130	Petition to classify status of alien relative for issuance of an immigrant visa.	\$130
I-360	Petition for an Amerasian, Widow(er) or special immigrant	\$130 <sup>2</sup>
I-751	Petition to remove the conditions on residence which is based on marriage	\$145
N-400	Application for Naturalization. For filing an application for naturalization under section 405 of the Immigration Act of 1990.	\$260
N-565	Application for a certificate of naturalization alleged to have been lost, mutilated, or destroyed; or for a certificate of citizenship in a changed name	\$155
N-600	Application for certificate of citizenship.	\$185
N-643	Application for a certificate of citizenship on behalf of an adopted child	\$145

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<sup>1</sup> ***Waiver of fees.*** Fees relating to applications, petitions, appeals, motions, or requests may be waived by the Immigration Judge in any case under his/her jurisdiction in which the alien or other party affected is able to substantiate that he or she is unable to pay the prescribed fee. The person seeking a fee waiver must file his or her affidavit, or unsworn declaration made pursuant to 28 U.S.C. 1746, asking for permission to prosecute without payment of fee of the applicant, petition, appeal, motion, or request, and stating his or her belief that he or she is entitled to or deserving of the benefit requested and the reasons for his or her inability to pay. The officer of the Service having jurisdiction to render a decision on the application, petition, appeal, motion, or request may, in his discretion, grant the waiver of fee.

<sup>2</sup> There is no fee for seeking classification as an Amerasian.

## APPENDIX B

### GENERAL PROCEDURES FOR FAMILY-BASED IMMIGRANT VISAS

#### I. STEP 1: CITIZEN RELATIVE FILES A PETITION

##### A. Forms You May Need

1. Form I-130: Petition for Alien Relative
2. Form I-360: Petition for Amerasian, Widow, or Special Immigrant
3. Form I-600: Petition to Classify Orphan as an Immediate Relative
4. Form I-600A: Application for Advanced Processing of Orphan Petition.

##### B. Supporting documentation to be filed with appropriate Petition Form (Usually I-130).

1. Documents that establish the U.S. citizenship or lawful permanent resident status of the petitioner and the claimed relationship of the petitioner to the beneficiary.
2. Evidence of petitioner's U.S. citizenship or lawful permanent residence may consist of:
  - a) Primary evidence. This is the preferred type of evidence. A petition *must be* accompanied by one of the following:
    - (1) A birth certificate issued by a civil authority establishing the petitioner's birth in the U.S.;
    - (2) An unexpired U.S. passport issued initially for a full ten-year period to a petitioner over the age of eighteen years as a citizen of the U.S. (and not merely as a non-citizen national);

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- (3) An unexpired U.S. passport issued initially for a full five-year period to the petitioner under the age of eighteen years as a citizen of the U.S. (and not merely as a non-citizen national);
  - (4) A statement executed by a U.S. consular officer certifying the petitioner to be a U.S. citizen and the bearer of a currently valid U.S. passport;
  - (5) The petitioner's Certificate of Naturalization or Certificate of Citizenship;
  - (6) Department of State Form FS-240, Report of Birth Abroad of a Citizen of the U.S., relating to the petitioner;
  - (7) The petitioner's Form I-551, Alien Registration Receipt Card, or other proof given by the Service as evidence of lawful permanent residence.
- b) Secondary evidence. If primary evidence is unavailable, the petitioner must present secondary evidence. Any evidence submitted as secondary evidence will be evaluated for authenticity and credibility and may or may not be accepted. Secondary evidence may include, but is not limited to, one or more of the following documents:
- (1) A baptismal certificate with the seal of the church, showing the date and place of birth in the U.S. and the date of baptism;
  - (2) Affidavits sworn to by persons who were living at the time and who have personal knowledge of the event to which they attest. The affidavits must contain the affiant's full name and address, date and place of birth, relationship to the parties, if any, and complete details concerning how the affiant acquired knowledge of the event;

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- (3) Early school records (preferably from the first school) showing the date of admission to the school, the child's date and place of birth, and the name(s) and place(s) of birth of the parent(s);
  - (4) Census records showing the name, place of birth, and date of birth or age of the petitioner.
- 3. Marriage. Must be valid in the jurisdiction where it was performed.
  - a) Proxy Marriages are not valid unless consummated under the Immigration Act. 8 U.S.C.A. § 1101(a)(35).
  - b) Watch “Sham” Marriages
    - (1) A sham marriage is one entered into to confer and immigration benefit.
    - (2) There is a *presumption* that the marriage is a sham if it is entered into within two years of immigration AND dissolved within two years of arrival.  
8 U.S.C.A. § 1227(a)(1)(G)(i)
- 4. Children. Must show parent-child relationship.
- 5. Original documents or legible, true copies of original documents are acceptable.
  - a) The Service reserves the right to require submission of original documents when deemed necessary.
  - b) Copies submitted with the petition will not be returned to the petitioner. Only original documents are returned when the Service requests them.



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- c) Foreign language documents must be accompanied by an English translation that has been certified by a competent translator.

### C. Jurisdiction.

1. Petitioner or self-petitioner residing in the U.S. File with the Service office having jurisdiction over the place where the petitioner or self-petitioner is residing. (District Office of INS). District Offices and their territory are listed in 8 C.F.R. § 100.4.
  2. Petitioner residing in certain countries abroad. The Service has overseas offices located in Vienna, Austria; Frankfurt, Germany; Athens, Greece; Hong Kong; New Delhi, India; Rome, Italy; Nairobi, Kenya; Seoul, Korea; Ciudad Juarez, Mexico City, Monterrey, Guadalajara, and Tijuana, Mexico; Manila, the Philippines; Singapore; Bangkok, Thailand; and London, the United Kingdom of Great Britain and Northern Ireland. If the petitioner resides in one of these countries, the petition must be filed with the Service office located in that country. The beneficiary does not have to reside in the same jurisdiction as the petitioner for the Service to accept the petition.
  3. Jurisdiction assumed by U.S. consular officer. U.S. consular officers assigned to visa-issuing posts abroad, except those in countries listed above, are authorized to accept and approve a relative petition or a petition filed by a widow or widower if the petitioner resides in the area over which the post has jurisdiction, regardless of the beneficiary's residence or physical presence at the time of filing.
- D. Proper filing. A petition is considered properly filed if the petitioner signs it and a fee has been received by the Service office or U.S. Consular office having jurisdiction.
- E. Filing date. The filing date of a petition is the date it is properly filed. The priority date of the petition is the date it is properly filed.
- F. The INS Investigates as required. When the Service determines that the evidence is not sufficient, the Service will provide an explanation of the deficiency and request additional evidence.

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- a) The petitioner has 60 days to present additional evidence, to withdraw the petition, to request a decision based on the evidence submitted, or to request additional time to respond.
  - b) If the director determines that the initial 60-day period is insufficient to permit the presentation of additional documents, the director may provide an additional 60 days for the submission. The total time cannot exceed 120 days, unless unusual circumstances exist.
  - c) Failure to respond to a request for additional evidence will result in a decision based on the evidence previously submitted.
- G. INS decides to approve or deny the petition.
- H. Appeal: Appeals may be made through the servicing INS office to the Board of Immigration Appeals. Appeals must be filed within 30 days of the denial of the petition. *See* 8 C.F.R. § 103.3 & Part 3.

## **II. STEP 2: VISA PROCESSING**

- A. Approved petitions (I-130) are sent to the Department of State Visa Processing Center. (8 C.F.R. § 204.2(a)(3)). Beneficiary (alien) receives an immigrant visa application packet.
- B. Forms You Need:
- 1. Every alien applying for an immigrant visa must make application on Form OF-230, Application for Immigrant Visa and Alien Registration. This requirement may not be waived. (22 C.F.R. § 42.63).
  - 2. Form I-864, Affidavit of Support. (8 C.F.R. § 213a)

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- C. Supporting Documentation. An alien applying for an immigrant visa is required to furnish, if obtainable<sup>1</sup>:
1. A passport<sup>2</sup> that is valid for at least 60 days beyond the period of validity of the visa (22 C.F.R. § 42.64);
  2. A copy of a police certificate or certificates;<sup>3</sup>
  3. A certified copy of any existing prison record,<sup>4</sup> military record,<sup>5</sup> and record of birth;<sup>6</sup> and
  4. Photographs. Every alien must furnish color photographs of the number and specifications prescribed by the Department of State, except that in countries where facilities for producing color photographs are unavailable as determined by the consular officer, black and white photographs may be substituted. (22 C.F.R. § 42.65(f))
  5. A certified copy of all other records or documents that the consular officer considers necessary.

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<sup>1</sup> A document or other record is considered unobtainable if it cannot be procured without causing actual hardship as opposed to normal delay and inconvenience. 22 C.F.R. § 42.65(d).

<sup>2</sup> The term "passport" means any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the entry of the bearer into a foreign country. 8 U.S.C. § 1101(a)(30).

<sup>3</sup> Police certificate means a certification by the police or other appropriate authorities reporting information entered in their records relating to the alien. 22 C.F.R. § 42.65(c)(1).

<sup>4</sup> Prison record means an official document containing a report of the applicant's record of confinement and conduct in a penal or correctional institution. 22 C.F.R. § 42.65(c)(2).

<sup>5</sup> Military record means an official document containing a complete record of the applicant's service and conduct while in military service, including any convictions of crime before military tribunals as distinguished from other criminal courts. A certificate of discharge from the military forces or an enrollment book belonging to the applicant is not acceptable in lieu of the official military record, unless it shows the alien's complete record while in military service. 22 C.F.R. § 42.65(c)(3).

<sup>6</sup> A certified copy of an alien's record of birth means a certificate issued by the official custodian of birth records in the country of birth showing the date and place of birth and the parentage of the alien, based upon the original registration of birth. 22 C.F.R. § 42.65(c)(4).

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- D. Medical examination. Before issuing an immigrant visa, every alien, regardless of age, must undergo medical examination by a physician selected from a panel approved by the consular officer to determine eligibility to receive a visa. (22 C.F.R. § 42.66)
- E. Place of application. Unless otherwise directed by the Department of State, an alien must apply for an immigrant visa at the consular office having jurisdiction over the alien's place of residence.<sup>7</sup> (22 C.F.R. § 42.61)
- F. Personal appearance. Every alien applying for an immigrant visa must appear personally before a consular officer for the execution of the application. (22 C.F.R. § 42.62).
- G. Interview of applicant. Every alien executing an immigrant visa application must be interviewed by a consular officer who determines on the basis of the applicant's representations and the visa application and other relevant documentation:
  - 1. The proper immigrant classification, if any, of the visa applicant; and
  - 2. The applicant's eligibility to receive a visa.

The officer has the authority to require that the alien answer any question deemed material to these determinations. (22 C.F.R. § 42.62).
- H. Execution of application, registration, and fingerprinting. (22 C.F.R. § 42.67)
  - 1. Application fee is collected and a receipt is issued.
  - 2. Oath and signature. The applicant is required to read the Form OF-230, Application for Immigrant Visa and Alien Registration, when it is completed, or it is read to the alien in the alien's language, or the alien otherwise informed of its full contents.

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<sup>7</sup> Note, however, that if the alien does not have a residence in the area, but is physically present, they may apply at that consular office if they establish that they will be able to remain in the area for the period required to process the application.

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3. Aliens are asked whether they are willing to subscribe thereto. If the alien is not willing to subscribe to the application unless changes are made in the information stated therein, the required changes will be made.
  4. The applicant will then swear to or affirm and sign the application before a consular officer, or a designated officer of the American Institute of Taiwan, who then signs the application over the officer's title.
- I. Registration. Form OF-230, when duly executed, constitutes the alien's registration record.
- J. Fingerprinting. An alien may be required at any time prior to the execution of Form OF-230 to have a set of fingerprints taken if necessary for purposes of identification or investigation.
- K. Informal evaluation of family members if principal applicant precedes them. (22 C.F.R. § 42.68)
1. Preliminary determination of visa eligibility. If a principal applicant proposes to precede the family to the U.S., the consular officer may arrange for an informal examination of the other members of the principal applicant's family to determine whether there exists at that time any mental, physical, or other ground of ineligibility on their part to receive a visa.
  2. When family member ineligible. If the consular officer finds that any member of such family would be ineligible to receive an immigrant visa, the principal applicant is informed and required to acknowledge receipt of this information in writing.
  3. No guarantee of future eligibility. A determination in connection with an informal examination that an alien appears to be eligible for a visa carries no assurance that the alien will be issued an immigrant visa in the future. The principal applicant is informed and required to acknowledge receipt of this information in writing. The question of visa eligibility can be determined definitively only at the time the family member applies for a visa.

## APPENDIX C

# The Soldier's Guide to Citizenship Application

18 May 2001

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### Introduction

The Department of Defense has partnered with the Immigration and Naturalization Service (INS) to assist non-citizen military members with their citizenship applications. The goal is to streamline and expedite the handling of their applications. The Department of the Army has directed its regionally dispersed Personnel Services Battalions (PSB) and Military Personnel Divisions (MPD) to serve as the local conduit to assist soldiers with their applications and to coordinate with PERSCOM as necessary to facilitate the process.

This guide provides an overview of the process and outlines the framework for customer support. Also, soldiers should visit the INS website for background information on procedures, fees, forms, or statutes that may affect the application process. The INS Guide to Naturalization and other references *can* be obtained from the INS web page at <http://www.ins.usdoj.gov/>.

### Applicability

This initiative is primarily designed to assist active duty soldiers who meet the criteria for citizenship based on 3 years of qualifying service in the Army. The Army has expanded the scope to also provide assistance to soldiers who do not have 3 years of qualifying service but do qualify for citizenship under the criteria for permanent residency. See Table T1 below. Applications for citizenship submitted by the family members of soldiers are not addressed by this initiative.

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### Eligibility Requirements

Table T1 below summarizes the naturalization eligibility requirements for military members. Following the table is a description of terms. If you still have questions about your eligibility, you should consult an immigrant assistance organization or INS.

TABLE T1

Basis for Eligibility	Category	Time as permanent resident	Continuous residency	Physical presence in the U.S.	Time in district or state	Good moral character	English & civics knowledge	Attachment to the Constitution
Permanent Resident for at least five (5) years, and currently on Active Duty for less than 3 years	A	Must be a permanent resident 5 years on the day application is filed	Required	Required minimum 30 months	Required	Required	Required	Required
Permanent Resident for at least three (3) years, have been married to a U.S. citizen for this 3 years, and currently on Active Duty for less than 3 years	B	Must be a permanent resident 3 years on the day application is filed	Required	Required minimum 18 months	Required	Required	Required	Required
Served in the Armed Forces during recognized periods and enlist/reenlist in the U.S. (Sec 329)	D	Not Required	Not Required	Not Required	Not Required	Required	Required	Required
Member of the U.S. armed forces and have served for at least 3 years (Sec 328)	D	Must be a permanent resident when INS examines the application	Not required	Not required	Not required	Required	Required	Required

### Definition of Terms

**Eligibility**--Active Army soldier, U.S. Army Reserve soldier on active duty, or National Guard soldier during such time as the unit is federalized.

**Category**--Throughout this document, you will see reference to your filing category. Refer to this section of the chart to review the associated criteria.

**Time as a permanent resident**--Permanent Residents are individuals who have Permanent Resident status in the United States as provided for under immigration laws. Permanent residents are normally given permanent resident cards (previously referred to as Alien Registration Cards).

**Continuous residence**--Continuous residence means that you have not lived outside the United States other than for military service during the period in question. Residence is



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defined as home of record, location of dependents, or location where applicant has resided for 3 months prior to filing the application.

Physical presence in the United States--Physical presence means that you have actually been in the United States. Most applicants must be physically present in the United States for a certain number of months to be eligible for naturalization. This requirement does not apply to military personnel applying under category D.

Time as a resident in district or state--Most people must live in the district or state in which they are applying for at least three months before applying. This requirement does not apply to military personnel applying under category D.

Good moral character--To be eligible for naturalization, you must be a person of good moral character. INS will make a determination on your moral character. Some of the things the INS may consider are:

- Criminal record--The Application for Naturalization, Form N-400, asks several questions about crimes. You should report all crimes you have committed, including ones that have been expunged (removed from your record) and those that happened before your 18<sup>th</sup> birthday. If you do not tell the INS about these crimes and they are discovered through background checks, you may be denied naturalization even if the crime itself was not a crime for which your case could be denied.
- Lying--If you do not tell the truth during your interview with the INS, they may deny your application for lacking good moral character. If INS grants you naturalization and you are later found to have lied during your interview, your citizenship may be revoked. If you have questions, you may want to seek advice from an immigrant assistance organization, legal assistance attorney, or an immigration attorney before applying.

English and civics knowledge--According to the law, applicants must demonstrate a good understanding of English and the form of government within the United States. Points to remember:

- Understanding of the English language, including the ability to read, write, and speak simple words and phrases in ordinary usage in the English language.
- Knowledge and understanding of the fundamentals of the history, principles, and form of government of the United States.

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### Procedures

#### Step 1. Prepare.

Reading and understanding is the first step in the naturalization process. Since naturalization requirements are difficult to understand, many people have questions. If you read this guide before beginning the naturalization process, many of your questions will be answered. Recommend you start by reviewing the checklist at Appendix A, which discloses the various documents applicable to your filing status.

#### Step 2. Complete the Naturalization Eligibility Worksheet.

If you do not meet all the requirements, you will save both time and money by waiting until you are eligible to apply. You cannot recover the application fee if the INS determines that you are not eligible to apply for citizenship. If you have questions about your eligibility, you should seek advice as specified below. The Naturalization Eligibility Worksheet is available on the INS webpage.

- Go to an INS center,
- Contact a community immigrant assistance organization, or
- Talk to a legal assistance or immigration attorney.

#### Step 3. Complete your Application.

After you have completed the eligibility worksheet and believe you are eligible for naturalization, you should obtain an Application for Naturalization (Form N-400). You may obtain Form N-400 at your supporting PSB/MPD or by calling the INS Forms Line at commercial 1-800-870-3676. The form may also be downloaded from the Internet at [www.ins.usdoj.gov](http://www.ins.usdoj.gov).

Part 2 of the form has a large influence on the amount of time it takes to process your application and which INS service center your application is ultimately mailed to. Most soldiers will apply under Category D or A. All soldiers must include the biographic data required on Form G-325B. Please be aware that you will be required to answer questions about your application at your interview. When completing your application, it is essential that you answer all questions honestly.

#### Step 4. Obtain Fingerprints.

Category D Applicants--Obtain the appointment letter at Appendix E from the PSB/MPD. PSB/MPDs can also download the appointment letter from the PERSCOM web. Through prior agreement with the INS, PSB/MPDs have the authority to schedule fingerprinting appointments at the servicing INS facility. A list of INS fingerprinting facilities is also available on the PERSCOM web page. The letter from the PSB/MPD will state where and when to have your fingerprints taken. Soldiers in Overseas Commands should contact the nearest Military Police Station or Security Manager for applicable procedures.

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Categories A and B Applicants--The PSB/MPD does not have authority to schedule appointments for soldiers filing under Category A or B. Soldiers filing under Category A or B will receive their appointment letters directly from the INS after the completed application is received for processing at INS. Soldiers in Overseas Commands should contact the nearest Military Police Station or Security Manager for applicable procedures.

After you receive the fingerprint appointment notice, go to the fingerprinting location. Take your fingerprint notice letter from INS, your Permanent Resident Card, and another form of identification (driver's license, military ID, passport, or state identification card) with you. Your second form of identification should have your photograph on it.

Get your fingerprints taken. INS will send your fingerprints to the FBI. If the FBI rejects your fingerprints, INS will notify you to schedule a second visit to the fingerprinting site. If your fingerprints are rejected, you will not be asked to pay again.

### **Step 5. Obtain Two (2) Photographs.**

You must include two color photographs with your application.

Both photographs must meet the following requirements:

- Have a glossy finish, be unmounted and printed on thin paper, and have a white background with a  $\frac{3}{4}$  profile view of the right side of your face.
- Your head should be bare unless you are required to wear a headdress by a religious order.
- The size should be no smaller than 40mm (1  $\frac{9}{16}$  inches) long and 35 mm (1  $\frac{3}{8}$  inches) wide and no larger than 80mm (3  $\frac{1}{8}$  inches) long by 60mm (2  $\frac{5}{16}$  inches) wide.
- The image must be at least 26mm (1 inch) wide and taken in natural color.
- Taken within 30 days of the date they are sent to INS.
- An area on the front left or right side of the photo should remain free, providing enough space for the applicant to write his/her full name. This writing will be performed during the interview.
- For more information on the photograph requirements, see the INS webpage.

### **Step 6. Collect the Necessary Documents.**

You will need to include copies of several documents with your application. Use the checklist at Appendix A to make sure you include the right documents. Send an English translation with any document that is not already in English. The translation must include a statement from the translator that he or she is competent to translate and that the translation is correct. In some instances, the checklist directs you to send original documents. If you must send an original document to INS, remember to make and keep a copy for your records. **If filing under Category A or B, proceed to step 9.**

### **Step 7. Bring your Completed Application and Fee to the PSB/MPD.**

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The PSB/MPD will review the documentation for accuracy/completeness. When the soldier brings in the completed Application for Citizenship, Form N-400, and the required forms/documentation, the PSB/MPD will review them to ensure that the forms are filled out correctly and that the required documentation is included (see checklist at Appendix B). The PSB/MPD must also ensure that a check or money order for the processing fee is included.

The PSB/MPD must verify the application and service data and then complete the backside of Form N-426.

The PSB/MPD will authenticate the soldier's service data, and after the information is validated, apply the official seal previously provided to INS to the N-426. The PSB/MPD will also sign the N-426.

### **Step 8. Fax Background Check and Consent Forms to CCF.**

The PSB/MPD will fax the Form G-325B (front and back) with all administrative data complete and a signed copy of the release forms (pages 10 and 11 of the SF-86, which is available from your local Security Office) for both personnel and medical records to: DSN 923-2706 or commercial (301) 677-2706. If a FAX machine is not available, mail a copy of the original form to the address below. Do not mail the original Naturalization Application to CCF. CCF will perform the required background check, complete the backside of the G-325B, and return the results to the PSB/MPD with the attached records. The PSB/MPD will append the results to the application packet and forward the completed packet to INS as depicted in Step 9.

US Army Central Personnel Security  
Clearance Facility  
ATTN: Management Branch  
FT MEADE, MD 20755-5250

**Category A and B Applicants**--The PSB/MPD will not forward the G-325B to CCF. Instead, the PSB/MPD will forward the G-325B with the application to INS with the front side completed. Upon receipt, INS will forward to CCF.

### **Step 9. Mail the Application to INS.**

There are five (5) INS locations to which applications are mailed. The soldier's filing category and residency dictates which INS Center will receive the application. Mail the packet as stipulated below.

- Soldiers applying under Category A or B from CONUS or OCONUS must mail their application to the INS Center serving the region in which they qualify for residency (see table T1). Be sure to include payment for the fee, the Form G-325B with all administrative data completed, and a signed copy of the release forms for the personnel and medical records check.

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- The California Service Center services Arizona, California, Hawaii, Nevada, Guam, and Northern Mariana Islands.

California Service Center  
P.O. Box 10400  
Laguna Nigel, CA 92677-0400

- The Nebraska Service Center services Alaska, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

Nebraska Service Center  
P.O. Box 7400  
Lincoln, NE 68501-7400

- The Texas Service Center services Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas.

Texas Service Center  
P.O. Box 851204  
Mesquite, TX 75185-1204

- The Vermont Service Center services Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, Washington DC, West Virginia, Puerto Rico, and the Virgin Islands.

Vermont Service Center  
75 Lower Weldon Street  
St. Albans, VT 05479-0001

- Soldiers filing under Category D, regardless of residency or the location where the application originates, must forward their packets to the Nebraska Service Center address listed below. The interview, however, may be scheduled at a service office convenient for the soldier. Note that the address is different from the Nebraska address that Categories A and B applicants use. Please include in the envelope a note identifying the installation mailing the application, the email and phone number of the local POC, and, if filing from OCONUS, where and when the soldier would like to be interviewed. **See Appendix E.**

US Immigration and Naturalization Service  
Nebraska Service Center  
PO BOX 87426  
Lincoln NE 68501-7426

### **Step 10. Wait for INS To Schedule your Interview.**

## APPENDIX C

After everything is ready, INS will schedule you for an interview and mail you a notice of the date, time, and place of the interview. It is very important that you attend the interview. If you must reschedule, contact the office where your interview is scheduled as soon as possible. You should explain your situation and ask to have your interview rescheduled. When a new date has been set, INS will send you a new interview notice. If your address changes before you get the interview notice, notify the INS of your new address by mailing the INS Form AR-11, Alien's Change of Address Card, to the INS or by calling the Customer Service number at: (800) 375-5283. You should also submit a change of address card at the Post Office and provide them your forwarding address.

### **Step 11. The Interview.**

Go to your local office for the interview at the specified time. You should appear at the office where you are to be interviewed before the time of your interview. Since many INS offices are crowded, you may not want to bring other people with you. If you fail to appear at your interview without contacting INS, your case will be administratively closed. If this happens and you do not contact INS within 1 year to reopen your case, your application will be denied. Rescheduling an interview may add several months to the naturalization process.

Provide additional documents if INS requests them. In some cases, INS may ask you to bring additional documents to the interview. These documents will be listed on your appointment letter. If you fail to bring the necessary documents, your case may be delayed or denied.

Take the English and Civics test. During your interview, your ability to read, write, and speak English will be tested. You will also be given a civics test to test your knowledge and understanding of U.S. History and Government. Many schools and community organizations help applicants prepare for their citizenship test. Some of these programs are very good; however, INS does not review or approve any of these outside classes or materials. You may want first to check the INS website for available study material. Test questions are provided as part of the INS Guide to Naturalization.

- English. Your English will be tested in one of the following ways:
- Reading. In order to test your reading ability, you may be asked to:
  - Read aloud parts of the N-400.
  - Read a set of civics questions and then answer them.
  - Read several simple sentences aloud.
- Writing. To test your writing skills, the INS officer will ask you to write one or two simple sentences.
- Speaking. Your speaking ability will be tested when you answer questions about yourself and your application.

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- Civics. You will be asked to answer verbally a set of civics questions or to take a written multiple-choice test with up to 20 questions.

Answer questions about your application and background. At your interview, an INS officer will place you under oath and then ask you about:

- Your background.
- Evidence supporting your case.
- Your place and length of residence.
- Your character.
- Your attachment to the Constitution.
- Your willingness to take an Oath of Allegiance to the United States.

The INS officer may ask you questions to make sure you meet all the eligibility requirements. Be prepared to explain any differences between your application and other documents you have provided to INS. Remember that you are under oath. Always tell the truth during your interview. If you are granted citizenship but the INS finds out later that you lied on your application or during your interview, your citizenship may be taken away.

A representative may accompany you to the interview if you have sent a Notice of Entry of Appearance as Attorney or Representative, Form G-28. Also, if you are exempt from the English requirements, you may bring an interpreter to the interview. If you have any disabilities, you may bring a family member or legal guardian with you at the discretion of the INS officer.

For future reference, request and write down the name and telephone number of the INS officer who conducted the interview. This information will facilitate the resolution of any issues or unexpected problems that may arise, especially if your application is continued or denied.

### **Step 12. The INS Decision.**

After your interview, your application for citizenship will be granted, continued, or denied.

**Granted**--Sometimes, INS can tell you if you will be granted citizenship at the end of your interview. Otherwise, you will receive a notice telling you when and where your oath ceremony will be.

**Continued**--The INS officer may also continue your case. This means your case is put on hold. The most common reasons for continuation are failing the English and civics tests or failing to give INS the documents they need. If your case is continued, you will either be asked to come to a second interview, usually within 60-90 days of the first interview, or to provide additional documents.

**Denied**--INS may also deny your application for naturalization. If INS denies your application, you will receive a written notice telling you why. There is an administrative review process for applicants who receive denials. If you believe that you were wrongly denied citizenship, you may request a hearing with an INS officer. Your denial letter will

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explain how to request a hearing and will include the form you need. The form for filing an appeal is the Request for Hearing Proceedings under Section 336 of the Act, Form N-336.

### **Step 13 Take the Oath.**

If INS approves your application for naturalization, you must attend a ceremony and take the Oath of Allegiance to the United States. Here are the procedures for this process:

**Receive a Ceremony Date.** INS will notify you by mail of the date and time of your ceremony. The notice INS sends you is called the Notice of Naturalization Oath Ceremony (Form N-445). In some cases, INS may give you the option of taking the Oath on the same day as your interview. If you decide to take a same day oath, INS will ask you to come back to the office later that day. At this time, you will take the Oath and receive your Certificate of Naturalization.

**Check in at the Ceremony.** When you arrive at the ceremony, you will be asked to check in with INS. Try to arrive early. Remember, there are many other people being naturalized with you who must also check in. If you cannot attend the ceremony on the day you are scheduled, return the INS notice (Form N-445) to your local INS office with a letter explaining why you cannot be at the ceremony and requesting that INS reschedule you.

**Return your Permanent Resident Card.** You will be required to return your Permanent Resident Card to INS when you check in for your oath ceremony. You will no longer need your Permanent Resident Card because you will receive your Certificate of Naturalization at the ceremony.

**Answer Questions about What You Have Done since your Interview.** If more than a day has passed between your interview and the ceremony, you will need to answer several questions. These questions are located on the back of the INS interview notice (Form N-445). You should read the questions carefully and mark your answers before you arrive at the ceremony.

**Take the Oath.** You are not a citizen until you have taken the Oath of Allegiance. The Oath can be found in the section entitled "Eligibility Requirements." If you are unable to swear the Oath, you may replace these words with "and solemnly affirm." If you are unable to use the words "so help me God" because of religious beliefs, you may omit these words. If you believe you qualify for a modified oath, you should include a letter with your application explaining the situation. INS may also ask you to provide a document from your religious organization explaining its beliefs and stating that you are a member in good standing.

Hereditary titles--If you have any hereditary titles or positions of nobility, you must give them up at the oath ceremony.

### **Step 14. Receive the Certificate of Naturalization.**



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After you have taken the Oath, you will receive your Certificate of Naturalization. You may use this document as proof that you are a U.S. citizen. It is strongly recommended that you obtain a U.S. passport soon after your naturalization ceremony.

Passport--A passport serves as evidence of citizenship and is easier to carry around than a Certificate of Naturalization. If you lose your Certificate of Naturalization, it can take up to one year to receive a new certificate.

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### APPENDIX A

#### Application Checklist

<b>All applicants must include</b>	
	Application for Naturalization, Form N-400.
	A photocopy of both sides of your Permanent Resident Card (previously known as the Alien Registration Card).
	Two color photographs (3/4 frontal image).
	An original Form G-325B, Biographic Information.
	A check or money order for the Processing Fee. The fee is \$225.00 if assigned to OCONUS. The fee is \$250.00 if assigned within the United States. Overseas applicants do not pay the \$25.00 fee for fingerprinting since they are completed at a government site.
<b>Other documents that may apply</b>	
	<b>If assigned overseas, include:</b>
	FD-258 (fingerprint card) completed by a U.S. consular or military installation.
	<b>If an attorney or accredited representative is acting in your behalf, include:</b>
	Form G-28, Notice of Entry of Appearance as Attorney or Representative.
	<b>If your current name is different from the name on your Permanent Resident Card, include:</b>
	The document which legally changed your name (marriage license, divorce decree, OR court document) OR a detailed explanation of why you use a different name.
	<b>If you are applying for naturalization on the basis of marriage to a U.S. citizen, include:</b>
	Proof that your spouse has been a U.S. citizen for at least the past 3 years (birth certificate, naturalization certificate, certificate of citizenship, copy of the inside of the front cover and signature page of your spouse's valid U.S. passport, OR Form FS240, Report of Birth Abroad of a Citizen of the United States of America).
	Your current marriage certificate.
	Proof of termination of ALL of your spouse's prior marriages (divorce decree OR death certificate).
	An original IRS Form 1722 listing tax information for the past 3 years OR copies of the income tax forms you filed for the past 3 years.
	<b>If you were previously married, include:</b>
	Proof of termination of ALL of your prior marriages (divorce decree OR death certificate).
	<b>If you are applying under qualifying military service, include:</b>

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	An original Form N-426, Request for Certification of Military or Naval Service.
	An original Form G-325B, Biographic Information.
	<b>If you have taken a trip outside the United States that lasted for 6 months or more since becoming a Permanent Resident, include:</b>
	An original IRS Form 1722 listing tax information for the past 5 years (or for the past 3 years if you are applying on the basis of marriage to a U.S. Citizen). Overseas assignment/TDY exceeding 6 months does not require the IRS Form 1722.
	<b>If you have a dependent spouse or children and have been ordered to provide financial support, include:</b>
	Copies of the court or government order to provide financial support AND
	Evidence that you have complied with the court or governing order (cancelled checks, money order receipts, a court or agency printout of child support payments, OR evidence of wage garnishments).
	<b>If you have ever been arrested or detained by any law enforcement officer for any reason and no charges were filed, include:</b>
	An official statement from the arresting agency or applicable court indicating that no charges were filed.
	<b>If you have ever been arrested or detained by any law enforcement officer for any reason and charges were filed, include:</b>
	An original certified copy of the complete court disposition for each incident (dismissal order, conviction record, OR acquittal order).
	<b>If you have ever been convicted or placed in an alternative sentencing program or rehabilitative program, include:</b>
	The sentencing record for each incident, AND
	Evidence that you completed your sentence (probation record, parole record, OR evidence that you completed an alternative sentencing program or rehabilitative program).
	<b>If you have ever had any arrest or conviction vacated, set aside, sealed, expunged, or otherwise removed from your record, include:</b>
	An original or certified copy of the court order vacating, setting aside, sealing, expunging, or otherwise removing the arrest or conviction.
	<b>If you have ever failed to file an income tax return when it was required by law, include:</b>
	Copies of all correspondence with the Internal Revenue Service (IRS) regarding your failure to file.
	<b>If you have any Federal, state, or local taxes that are overdue, include:</b>

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	A signed agreement from the IRS, state, or local tax office showing that you have filed a tax return and arranged to pay the taxes you owe, AND
	Documentation from the IRS, state, or local tax office showing the current status of your repayment program.
	<b>If you did not register with the Selective Service and you (1) are male, (2) are over 26 years old, and (3) lived in the United States in a status other than as a lawful nonimmigrant between the ages of 18 and 26, send:</b>
	A "Status Information Letter" from the Selective Service (call 1-847-688-6888 for more information).

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### APPENDIX B

#### Personnel Services Battalion (PSB) /Military Personnel Division (MPD) Checklist for Naturalization Application

<b>Completion of the Form N-400, Application for Naturalization</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
Is the form filled out completely?			
Is the appropriate block in Part 2 of the form checked?			
If the applicant checked block "d", is the Form N-426 attached?			
If the applicant answered "yes" to one or more questions in Part 7 of the N-400, is an explanation on a separate sheet attached?			
If the applicant answered "no" to one or more questions in Part 8 of the N-400, is an explanation on a separate sheet of paper attached?			
Has the applicant signed the N-400 in Part 11?			
<b>Completion of the Form N-426, Request for Certification of Military or Naval Service (Category D only)</b>			
Is the form filled out completely?			
Has the PSB/MPD obtained the information required to complete sections 11 and 12 of the form?			
Has the PSB/MPD verified the service dates and derogatory data?			
Has the back of the form been signed by the PSB/MPD and stamped with the official seal (i.e., the seal used to authenticate PCS/TDY orders)?			
<b>Completion of the Form G-325B, Biographic Information</b>			
Is the form filled out completely (required for all applications)?			
<b>Other required actions</b>			
Has the soldier included a check for the application fee in the correct amount?			
Has the soldier included other necessary documents, such as marriage certificates, divorce certificates, etc.?			
Has the PSB/MPD faxed the G-325B and signed release forms to the Central Clearance Facility (CCF) at Fort Meade (Category D only)?			
Has the PSB/MPD suspended mailing the N-400 with the application fee and other pertinent documents until receipt of the G-325B from CCF (Category D only)?			

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Has the PSB/MPD included a cover sheet indicating the PSB/MPD POC and commercial phone number and email address, and for Category D applicants, where and when the applicant would like to be interviewed (see format at Appendix E)?			
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# APPENDIX C

## Appendix C Where to Go for Help

There are many resources available to naturalization applicants. Some of these are:

**Personnel Services Battalion (PSB)/Military Personnel Division (MPD).** The PSB/MPD is your primary contact for citizenship application. They have all the information you need to become familiar with the naturalization process and to obtain help for completing your application. The PSB/MPD will assist with completing the forms, service date verification, and forwarding the overall application package to the INS Service Center.

**INS.** If you want more information about naturalization, you may call the "Ask Immigration" telephone number listed on the sheet titled, "Your Local Office," available at the PSB/MPD. Also, you may visit the INS web site. If you have already submitted an application and need the status, call the National Customer Service Center help line: (800) 375-5283. If you are filing under category D and there has been no feedback from INS within 6 months, you may request that the PSB/MPD contact the Nebraska Service Center Military Facilitator for a status check of your application. Prior to contacting the Military Facilitator, you must provide the PSB/MPD the following information:

- Your Name.
- Your Alien Number.
- Date the N-400 was filed.
- Your current address.
- Date and type of last INS activity (e.g., fingerprint notice, request for documents, etc.).

**Community Based Organizations (CBOs).** In most communities, there are organizations that assist immigrants who want to become naturalized. These organizations often offer classes in English and civics. They may also help immigrants complete their applications. CBOs may charge a fee, or they may offer their services free of charge. You may locate a CBO by contacting your local INS office. You may also look in the phone book under "Immigration and Naturalization" or "Immigration and Naturalization Consultants" or talk to other immigrants who have been naturalized.

**The Local Legal Assistance Office or Immigration Attorneys.** If you have questions about your eligibility, legal advice may be appropriate.

**INS Information Counters.** If you have questions that have not been answered either by this guide or by the other sources listed here, you may always go to the information counter at your local INS office. There, you may speak directly to an INS employee.

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### APPENDIX D Responsibilities

**Soldier.** The applicant must:

- Ensure that all required forms are properly completed.
- Ensure that the required documentation is filed with the application (photographs, application fee, marriage certificates, divorce certificates, etc.).
- Keep the Immigration and Naturalization Service (INS) informed of any changes in address.
- Obtain fingerprints at the scheduled date/time.
- Attend the interview at the scheduled date/time.
- Complete the Oath of Allegiance at the scheduled date/time.
- Notify INS immediately of any schedule conflicts with fingerprinting, interview, or oath.

**Personnel Services Battalion (PSB)/Military Personnel Division (MPD).** The role of the PSB/MPD in the citizenship application process is primarily administrative:

- Stocking applicable forms and guidance.
- Assisting soldiers in completing and submitting their citizenship applications.
- Preparing a cover memorandum to INS with the information contained in Appendix E for each applicant.
- Serving as a liaison between the soldier and INS when required.

**Personnel Service Support Division (PSSD), U.S. Total Army Personnel Command (PERSCOM).** The primary functions of PSSD are to monitor the application process and to resolve problems. PSSD will:

- Establish procedural guidance.
- Serve as a liaison among PSB/MPD, the Army Office of the Deputy Chief of Staff for Personnel (ODCSPER), and the INS.

**Directorate of Military Personnel Management (DMPM), ODCSPER.** DMPM is the Army's POC for the citizenship application process. DMPM will:

- Manage the Army's involvement in the citizenship application process.
- Direct procedural changes as required or if determined by INS or the Department of Defense (DoD).
- Monitor the overall progress of the citizenship application process.
- Report to DoD as required on the timeliness of citizenship applications.
- Resolve issues elevated by PERSCOM.



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### APPENDIX E SAMPLE COVER LETTER FOR FACILITATED MILITARY APPLICATIONS

TO: USINS NEBRASKA SERVICE CENTER DATE PO BOX 87426 LINCOLN NE 68501-7426

FROM: NAME OF MILITARY POINT OF CONTACT phone number

ADDRESS e-mail

ADDRESS

RE: Application for Naturalization, Form N-400

Applicant's name: Applicant's INS A#: Applicant's SSN:

Current Physical Location of the Applicant:

Applicant's Current US Mailing Address:

This facilitated military N-400 application contains the following documentation and/or information:

\_\_\_ Form N-400, completed and signed.

\_\_\_ Pictures.

\_\_\_ Check or money order in the amount of: \$ \_\_\_\_.

\_\_\_ Certified N-426.

\_\_\_ G-325B copy (original sent to OJAG (Code 36)).

**Fingerprints:** \_\_\_ included with this package (if taken overseas).

\_\_\_ the applicant has been scheduled at (place) for (date of appointment).

**Applicant's preferred date range for the interview** (at least six months after submitting the application):

**Dates of projected permanent change of station moves, deployments, extended temporary duty, if any:**

**For overseas military applicants:**

US INS office where applicant wishes to be interviewed: \_\_\_\_\_

US address to be used at time of interview scheduling or a point of contact within the US:

\_\_\_\_\_

Periods of time applicant may be back inside the United States: \_\_\_\_\_

US phone/email address: \_\_\_\_\_

Overseas phone/email address: \_\_\_\_\_

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### APPENDIX F FINGERPRINT NOTICE

Fingerprint Notification			NOTICE DATE
CASE TYPE N-400 Application for Naturalization			INS A#
APPLICATION NUMBER Department of Defense Referral	RECEIVED DATE	PRIORITY DATE	PAGE 1 of 1

APPLICANT NAME AND MAILING ADDRESS

**APPLICATION SUPPORT CENTER** To process your application, INS must take your fingerprints and have them cleared by the FBI.

PLEASE APPEAR AT THE BELOW APPLICATION SUPPORT CENTER AT THE DATE AND TIME SPECIFIED. If you are unable to do so, complete the bottom of this notice and return the entire original notice to the address below. **Rescheduling your appointment will delay your application. IF YOU FAIL TO APPEAR AS SPECIFIED BELOW OR REQUEST RESCHEDULING, YOUR APPLICATION WILL BE CONSIDERED TO BE ABANDONED.**

PLEASE DISREGARD THIS NOTICE IF:

1. YOU HAVE BEEN FINGERPRINTED WITHIN THE LAST 90 DAYS,
2. YOUR APPLICATION HAS ALREADY BEEN GRANTED, OR
3. **YOU WERE UNDER 14 YEARS OF AGE OR OVER 79 (75 FOR NATURALIZATION APPLICANTS) AT THE TIME YOUR APPLICATION WAS FILED.**

WHEN YOU GO TO THE APPLICATION SUPPORT CENTER TO HAVE YOUR FINGERPRINTS TAKEN, YOU MUST BRING:

1. THIS APPOINTMENT NOTICE and
2. PHOTO IDENTIFICATION. Naturalization applicants must bring their Alien Registration card. All other applicants must bring a passport, driver's license, national ID, military ID, or State-issued photo ID. If you appear without proper identification, you will not be fingerprinted.

**WARNING!**

*Specific appointment time requests will not be guaranteed. Due to limited seating availability in our lobby areas, only persons who are necessary to assist with transportation or completing the fingerprint worksheet should accompany you.*

APPLICATION NUMBER  
Department of Defense Referral

**REQUEST FOR RESCHEDULING**

I am unable to appear because:

---

Please reschedule my appointment for the next available: ☐ Wednesday afternoon.

..... ☐ Saturday afternoon.

INS cannot guarantee the day preferred but will do so to the extent possible.  
If you have any questions regarding this notice, please call 1-888-557-5398.

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### APPENDIX G INS APPLICATION SUPPORT CENTERS (FINGERPRINT LOCATIONS)

DISTRICT	CITY	ST	BUILDING NAME/ROOM NUMBER	STREET ADDRESS	ZIP	HOURS
<b>ALASKA</b>						
	ANCHORAGE	AK	SUITE 007	620 E. 10TH AVENUE	99501	M-F 8-4
<b>ATLANTA</b>						
	ATLANTA	GA	SUITE 100	3523 BUFORD HIGHWAY	30329	T-S 8-4
	CHARLOTTE	NC	BLDG. 6, SUITE 203	210 E. WOODLAWN ROAD	28217	T-S 8-4
	BIRMINGHAM	AL	TERMINAL A	5900 AIRPORT HWY, TERMINAL A-17	35232	M-F 8-4
	CHARLESTON	SC	5TH FLOOR	170 MEETING STREET	29403	M-F 8-4
	RALEIGH	NC	CITY CNTY BUREAU OF IDENTIFICATION	330 S. SALISBURY ST	27602	
<b>BALTIMORE</b>						
	WHEATON	MD	GLENMONT PLAZA	12331-C GEORGIA AVE.	20906	T-S 8-4
	BALTIMORE	MD	FALLON FEDERAL BUILDING	31 HOPKINS PLAZA	21201	M-F 8-4
	SALISBURY	MD	SUITE 11	119 W. NAYLOR MILL ROAD	21801	M-F 8-4
<b>BOSTON</b>						
	BOSTON	MA		170 PORTLAND STREET	02114	T-S 8-4
	HARTFORD	CT		249 PEARL ST	06103	T-S 8-4
	PROVIDENCE	RI	MOULTON HALL BLDG	333 WESTMINSTER STREET	02903	T-S 8-4
	MANCHESTER	NH		803 CANAL ST.	03101	M-F 8-4
<b>BUFFALO</b>						
	BUFFALO	NY		130 DELAWARE AVENUE	14202	M-F 8-4
	ALBANY	NY	ROOM 226A	445 BROADWAY	12207	M-F 8-4
	SYRACUSE	NY		412 S. WARREN STREET	13202	M-F 8-4
<b>CHICAGO</b>						
	NORRIDGE	IL	NORRIDGE COMMONS SHOPPING CENTER	4137 N. HARLEM AVE.	60640	T-S 8-4
	CHICAGO	IL	SUPER MALL, SPACE 101	5160 S. PULASKI	60632	T-S 8-4

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				AVE		
	CHICAGO	IL		4853 N. BROADWAY	60640	T-S 8-4
	NAPERVILLE	IL	#124	888 SOUTH ROUTE. 59	60540	T-S 8-4
	WAUKEGAN	IL		25 SOUTH GREENBAY RD.	60085	T-S 8-4
	HAMMOND	IN	INDIANAPOLIS BLVD. (RT. 41)	7852 INTERSTATE PLAZA DRIVE	46324	T-S 8-4
	INDIANAPOLIS	IN		950 N. MERIDIAN STREET	46204	T/T/F8-12
	MILWAUKEE	WI	ROOM 176	517 E. WISCONSIN AVE.	53202	M-F 8-4
<b>CLEVELAND</b>						
	CLEVELAND	OH	AJC FEDERAL BLDG. RM 1259	1240 E. 9TH ST.	44199	M-F 8-4
	CINCINNATI	OH	ROOM 1524	550 MAIN STREET	45202	M-F 8-4
	COLUMBUS	OH	LEVEQUE TWRS, SUITE 306	50 W BROAD ST	43215	M-F 8-4
<b>DALLAS</b>						
	DALLAS	TX	VILLAGE AT BACHMAN LAKE, SUITE 211	3701 W. NORTHWEST HWY	75220	T-S 8-4
	FT. WORTH	TX	INSIDE FT. WORTH TOWN CENTER MALL	4200 S. FREEWAY, SUITE 1309	76115	T-S 8-4
	LUBBOCK	TX	SUITE A-24	3502 SLIDE ROAD	79414	T-S 8-4
	OKLAHOMA CITY	OK	SUITE 300	4149 HIGHLINE BLVD.	73108	M-F 8-4
<b>DC</b>						
	ALEXANDRIA	VA		5834D N. KINGS HWY	22303	T-S 8-4
	NORFOLK	VA		5280 HENNEMAN DRIVE	23513	M-F 8-4
<b>DENVER</b>						
	AURORA	CO	UNIT G	15037 E. COLFAX AVE.	80011	T-S 8-4
	TAYLORSVILLE	UT	SUITE C	5536 SOUTH 1900 WEST ST.	84118	T-S 8-4
	GRAND JUNCTION	CO	ROOM 230	400 ROOD AVE	81501	M-F 8-4

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	CASPER	WY	ROOM 1014	150 EAST B STREET	82601	M-F 8-4
<b>DETROIT</b>						
	DETROIT	MI		2652 EAST JEFFERSON AVE.	48207	T-S 8-4
	SAULT ST. MARIE	MI		USINS INTERNATIONAL BRIDGE PLAZA	49783	M-F 8-4
<b>EL PASO</b>						
	EL PASO	TX		10500 MONTWOOD DR.	79935	T-S 8-4
	ODESSA	TX		1655 W. COUNTY RD.	79763	T-S 8-4
	ALBUQUERQUE	NM	SUITE B ROOM 132	1720 RANDOLPH RD. SE	87106	M-F 8-4
<b>HARLINGEN</b>						
	MCALLEN	TX	SUITE C	220 SOUTH BICENTENNIAL	78501	T-S 8-4
	BROWNSVILLE	TX	SOUTHWIND SHOPPING CNTR, SUITE 23	943 NORTH EXPRESSWAY 77	78520	T-S 8-4
<b>HELENA</b>						
	HELENA	MT		2800 SKYWAY DRIVE	59602	
	BOISE	ID	ROOM 108	4620 OVERLAND RD	83705	M-F 8-4
	IDAHO FALLS	ID	SUITE 190	1820 E. 17TH STREET	83404	
<b>HONOLULU</b>						
	HONOLULU	HI		595 ALA MOANA BLVD.	96813	M-F 8-4
	HAGATNA	GU	100	SIRENA PLAZA, HERNAN CORTEZ AVE.	96910	M-F 8-4
	KAILUA KONA	HI	INS AIRPORT OF., KONA INT'L AIRPOR	QUEEN KAAHUMANU HWY, AIRPORT EXIT	96745	
<b>HOUSTON</b>						
	HOUSTON	TX	CORUM PLAZA	8505-D GULF FREEWAY (EXIT 38)	77017	T-S 8-4
	HOUSTON	TX	FONDREN ROAD PLAZA	7086 BISSONET ST	77074	T-S 8-4

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<b>KANSAS CITY</b>						
	KANSAS CITY	MO		9747 N. CONANT AVENUE	64153	M-F 8-4
	WICHITA	KS	SUITE 1050	271 WEST 3RD ST. NORTH	67202	M-F 8-4
	ST. LOUIS	MO	ROOM 1.100	1222 SPRUCE STREET,	63103	M-F 8-4
<b>LOS ANGELES</b>						
	POMONA	CA	SUITE 110	435 W. MISSION BLVD	91766	T-S 8-4
	SO. EL MONTE	CA	GOLDEN VISTA PLAZA, UNIT Q	9251 GARVEY AVE	91733	T-S 8-4
	GARDENA	CA	ROOM B-112	15715 CRENSHAW BLVD.	90249	T-S 8-4
	VAN NUYS	CA	2ND FLOOR SUITE 200	14515 HAMLIN STREET	91411	T-S 8-4
	BELLFLOWER	CA	BELLFLOWER PLAZA; SUITE A-110	17610 BELLFLOWER BLVD	90706	T-S 8-4
	LOS ANGELES	CA		5949 W. PICO BLVD.	90035	T-S 8-4
	SANTA ANA	CA	SUITE 100 - A	1666 N. MAIN ST.	92701	T-S 8-4
	BUENA PARK	CA	SUITE A	8381 LA PALMA AVE	90620	T-S 8-4
	RIVERSIDE	CA		10082 MAGNOLIA AVE	92503	T-S 8-4
	OXNARD	CA	CARRIAGE SQ SHP CTR SUITE 100	250 W. CITRUS GROVE LANE	93030	T-S 8-4
	GOLETA	CA	SUITE B	6831-B HOLLISTER AVE.	93117	T-S 8-4
	LOS ANGELES	CA		888 WILSHIRE BLVD.	90017	M-F 8-4
	GARDENA	CA		15715 CRENSHAW BLVD.	90249	
	LOS ANGELES	CA	INACTIVE	360 E. 2ND ST.	90012	M-F 8-4
<b>MIAMI</b>						
	HIALEAH	FL	WESTLAND PROMENADE, SUITE 110	3700 WEST 18TH AVE	33012	T-S 8-4
	MIAMI	FL		6445 NE SEVENTH AVE	33138	T-S 8-4
	MIAMI	FL	SUITE J-6	11865 SW 26TH STREET (CORAL WAY)	33175	T-S 8-4

## APPENDIX C

	DAVIE	FL		11690 STATE ROAD 84	33325	T-S 8-4
	ORLANDO	FL	HOFFNER COMMERCE CTR, UNIT 18C	5449 S SEMORAN BLVD	32822	T-S 8-4
	TAMPA	FL	BAY PLAZA 1, SUITE 401	9225 BAY PLAZA BLVD	33619	T-S 8-4
	WEST PALM BEACH	FL	SUITE 15B	2501 BRISTOL DRIVE	33401	T-S 8-4
	JACKSONVILLE	FL		4121 SOUTHPOINT BLVD.	32216	M-F 8-4
<b>NEW ORLEANS</b>						
	NEW ORLEANS	LA	ROOM T-8011	701 LOYOLA AVENUE	70113	M-F 8-4
	FORT SMITH	AR	BLDG. D	4991 OLD GREENWOOD BUS PARK	72903	M-F 8-4
	JACKSON	MS	MCCOY FEDERAL BUILDING	100 W CAPITOL ST, SUITE B8	39269	M-F 8-4
	MEMPHIS	TN	SUITE 100	1341 SYCAMORE VIEW	38134	M-F 8-4
	NASHVILLE	TN	C/O USINS, CONCOURSE A, GATE A5	1 TERMINAL DR, NASHVILLE AIRPORT	37214	M-F 8-4
	LOUISVILLE	KY	ROOM 601	601 W. BROADWAY	40202	M-F 8-4
<b>NEW YORK</b>						
	NEW ROCHELLE	NY		246 NORTH AVE.	10802	T-S 8-4
	BROOKLYN	NY		227 LIVINGSTON ST.	11201	T-S 8-4
	BRONX	NY		2378 GRAND CONCOURSE	10458	T-S 8-4
	NEW YORK	NY	SUITE 1023	201 VARICK STREET	10014	M-F 8-4
	HEMPSTEAD	NY	SUITE B	100 MAIN ST.	11550	T-S 8-4
	JAMAICA	NY	CORNER OF GUY R. BREWER BLVD.	162-24 JAMAICA AVE.	11432	T-S 8-4
	WOODSIDE	NY		63-05 ROOSEVELT AVE	11377	T-S 8-4
<b>NEWARK</b>						
	NEWARK	NJ	100	24 COMMERCE STREET	07102	T-S 8-4
	HACKENSACK	NJ		127 MAIN ST.	07601	T-S 8-4
<b>OMAHA</b>						

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	OMAHA	NE		3724 S. 132ND STREET	68144	M-Th 8-4
	DES MOINES	IA	#369	210 WALNUT STREET	50309	M-Th 8-4
<b>PHILADELPHIA</b>						
	PHILADELPHIA	PA		120 NORTH 8TH STREET	19107	T-S 8-4
	PITTSBURGH	PA	SUITE 101	800 PENN AVE,	15222	T-S 8-4
	CHARLESTON	WV		210 KANAWHA BLVD. WEST	25302	
	DOVER	DE		1305 MCD DRIVE	19901	M-F 8-4
<b>PHOENIX</b>						
	LAS VEGAS	NV		6175 SOUTH PECOS ROAD	89120	T-S 8-4
	TUCSON	AZ	SUITES 216/217	1835 SOUTH ALVERNON	85711	T-S 8-4
	PHOENIX	AZ		2545 E. THOMAS RD.	85016	T-S 8-4
	RENO	NV		1351 CORPORATE BLVD.	89502	M-F 8-4
	SAN LUIS	AZ	MILE MARKER 0	INTL BORDER, HWY 95 MILE MARKER 0	85349	M-F 8-4
<b>PORTLAND ME</b>						
	SOUTH PORTLAND	ME		176 GANNETT DRIVE	04106	M-F 8-4
	ST. ALBANS	VT		64 GRICE BROOK RD	05478	M-F 8-4
	HOULTON	ME	POB 189	US INS POE AT END OF INTERSTATE 95	04730	M-F 8-4
<b>PORTLAND OR</b>						
	PORTLAND	OR		103 SW 4TH AVE.	97204	T-S 8-4
<b>PUERTO RICO</b>						
	HATO REY	PR		458 CANALS ST.	00918	T-S 8-4
	ST. THOMAS	VI	FIRST FLOOR SOUTH	NISKY CENTER, SUITE 1A	00802	M-F 8-4
	CHRISTIANSTED, ST CROIX	VI		SUNNY ISLES SHOPPING CTR	00823	M-F 8-4
<b>SAN ANTONIO</b>						
	SAN ANTONIO	TX	AT RANDOLPH BLVD./BEHIND STOP-N-GO	5121 CRESTWAY DRIVE. SUITE	78239	T-S 8-4



## APPENDIX C

				112		
	LAREDO	TX	COLOMBIA PORT OF ENTRY	FARM TO MARKET RD. 1472	78045	M-F 8-4
<b>SAN DIEGO</b>						
	SAN DIEGO	CA		2509 EL CAJON BLVD.	92104	T-S 8-4
	SAN MARCOS	CA	SUITE 101, 102	727 W. SAN MARCOS BLVD.	92069	T-S 8-4
	CALEXICO	CA		16 HEFFERNAN AVE.	92231	M-F 8-4
<b>SAN FRANCISCO</b>						
	OAKLAND	CA		2040 TELEGRAPH AVE.	94612	T-S 8-4
	SANTA ROSA	CA	SUITE 100	1401 GUERNEVILLE RD	95403	T-S 8-4
	SALINAS	CA	SANTA RITA PLAZA	1954 N. MAIN STREET	93906	T-S 8-4
	SACRAMENTO	CA	SUITE B	3401 FOLSOM BLVD	95816	T-S 8-4
	MODESTO	CA	SUITE 14	901 N. CARPENTER RD.	95351	T-S 8-4
	FRESNO	CA		4893 E. KINGS CANYON	93727	T-S 8-4
	BAKERSFIELD	CA	SUITES A12	4701 PLANZ RD	93309	T-S 8-4
	SAN FRANCISCO	CA		250 BROADWAY	94111	T-S 8-4
	SAN JOSE	CA	RM 15 (LOCATED BEHIND TACO BELL)	740 STORY ROAD	95122	T-S 8-4
<b>SEATTLE</b>						
	BURIEN	WA	SUITE 101	457 S.W. 148 STREET	98166	T-S 8-4
	SPOKANE	WA	ROOM 691	920 WEST RIVERSIDE	99201	M-F 8-4
	RICHLAND	WA	ROOM 165	825 JADWIN AVE	99352	M-F 8-4
	YAKIMA	WA		417 E. CHESTNUT	98901	M-F 8-4
<b>ST. PAUL</b>						
	ST. PAUL	MN	#103	1360 UNIVERSITY AVE.	55104	T-S 8-4
	RAPID CITY	SD		1675 SAMCO ROAD	57702	M-F 8-4

## APPENDIX C

	FARGO	ND	SIUTE 104	657 2ND AVENUE NORTH	58102	M-F 8-4
	SIOUX FALLS	SD	RIVERSIDE STATION	300 EAST 8TH STREET	57104	M-F 8-4
	DULUTH	MN	208 FEDERAL BLDG	515 W. FIRST ST.	55802	M-F 8-4
	INTERNATIONAL FALLS	MN		#2 SECOND AVE.	56649	
	GRAND PORTAGE	MN		9403 E. HIGHWAY 61	55605	
	ANTLER	ND	INS-PORT OF ENTRY	10943 HWY 256	58711	
	PEMBINA	ND	SUITE I	10980 I-29	58271	
	WINNEPEG	MB	ROOM 1092	2000 WELLINGTON AVE.	R3H 1C1	

## APPENDIX C

### APPENDIX H CITIZENSHIP APPLICATION PROCESSING EVENTS

1. You should receive a receipt within 30 days after the Immigration and Naturalization Service (INS) Nebraska Service Center receives your application for citizenship. If you have not received your receipt within 60 days after your Personnel Services Battalion (PSB)/Military Personnel Division (MPD) mailed your application packet, you may ask your PSB/MPD to send an E-mail status inquiry to the INS Nebraska Service Center.
2. The INS goal is to process your case within four months after receipt of application packet. The INS interview site will schedule your interview and mail you a notice of the date, time, and place. If you have not received your interview notice within five months after INS acknowledged receipt of your application, you may ask your PSB/MPD to send an E-mail status inquiry to the INS Nebraska Service Center.
3. Upon completion of your interview, your application for citizenship may be granted, continued, or denied.
  - a. If your application is granted, you may be sworn in as a citizen one day to two weeks after your interview, depending on when the local INS office can schedule your ceremony. The INS representative may be able to tell you if your citizenship is granted at the end of the interview. If so, you will be informed when and where you will swear or affirm the oath of citizenship. If not, INS will send you notice of the date, time, and place of your ceremony.
  - b. If your case is continued, your application will be placed on hold. The most common reasons for continuing cases are failure of the English/civics tests and missing documentation. Depending on the circumstances, you will be asked to come back for a second interview (usually within 60-90 days of the first interview) and/or to provide INS with additional documents. If you are asked to provide additional documents, you must do so within 30 days. Failure to provide the required materials within 30 days will cause INS to deny your application for citizenship.
  - c. If your application is denied, INS will send you a written notice explaining why. Information on your options (i.e., how to file a Motion to Reopen or a Motion to Reconsider your case with the decision making office and how to appeal the decision to a higher authority) if you disagree with the reasons for denial will be included with this notice. At this point, you may want to seek advice about your situation and options from your local Army Legal Assistance Office. The notice of the date, time, and place of the hearing resulting from your motion or appeal will be your only form of receipt/acknowledgement from INS.
4. The most frequently occurring reason why applications for citizenship get delayed or denied is because applicants fail to inform INS of their current mailing address. It is imperative that INS has your current address. They cannot contact you without it. As a rule of thumb, you should provide INS your new mailing address every time it changes, including such events as a PCS move, departure on a deployment, return from a deployment, reassignment to a different unit if you receive mail at your unit, a move to different living quarters if you receive mail at your residence, extended temporary duty (TDY), or any other situation that would cause you to file a change of address form in your unit/installation mail room. The most effective and efficient way to update your mailing address is by calling the INS Customer Service Number, 1-800-375-5283.
5. The Army does not want to lose good soldiers solely because of delays in naturalization. Although you may not reenlist for service beyond eight years unless you are a U.S. citizen, you may extend your current enlistment if you are otherwise qualified for reenlistment and can show documentary evidence (e.g., a receipt from INS) that you have filed an application for citizenship. For more information and assistance with requesting such an extension, you should consult your Reenlistment NCO or Career Counselor.

## APPENDIX C

6. The keys to success in achieving your goal of becoming a citizen of the United States are accuracy, completeness, and communication. It is essential that you follow correctly all of the INS instructions. Completely furnishing all of the requested information and responding to all communications from the INS as quickly as possible will help. INS has assured the Army that they will work with soldiers who meet these conditions. For example, if the interview appointment date is during a time that you are or expect to be deployed, promptly send back this information on the interview response card with periods of time you are available, and INS will attempt to schedule your interview for one of these days. If you qualify for naturalization and follow the correct procedures, you will become a citizen of the United States of America.

## **APPENDIX D**

### **MILPER MESSAGE NUMBER : 01-134 TAPC-PDO CITIZENSHIP APPLICATION PROCESSING PROCEDURES**

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1. THIS MILPER MESSAGE WILL EXPIRE NOT LATER THAN 1 MAY 2003.
2. THE U.S. IMMIGRATION AND NATURALIZATION SERVICE (INS) RECENTLY CHECKED THE QUALITY OF A RANDOM SAMPLE OF CITIZENSHIP APPLICATION PACKETS SUBMITTED BY THE ARMED FORCES UNDER THE MILITARY FACILITATED PROGRAM. ALL PACKETS RECEIVED FROM THE ARMY WERE FOUND TO BE COMPLETE AND OF ACCEPTABLE QUALITY. ACCORDING TO THIS SAMPLING, ARMY PROCEDURES ARE WORKING, AND THE PERSONNEL SERVICES BATTALIONS (PSB) AND MILITARY PERSONNEL DIVISIONS (MPD) ARE DOING A GOOD JOB OF ENSURING THAT SOLDIERS' APPLICATIONS MEET MINIMUM STANDARDS. CONGRATULATIONS ON A JOB WELL DONE SO FAR, AND KEEP UP THE GOOD WORK!
3. UNFORTUNATELY, INS NEBRASKA HAS ALSO RECEIVED MANY INCOMPLETE APPLICATION PACKETS, OFTEN FROM VETERANS WITH NO CURRENT MILITARY CONNECTION OR FROM MILITARY PERSONNEL WHO SUBMIT THEIR APPLICATIONS ON THEIR OWN INSTEAD OF GOING THROUGH OFFICIAL CHANNELS UNDER THE MILITARY FACILITATED PROGRAM. EFFECTIVE 1 APRIL 2001, THE ONLY CITIZENSHIP APPLICATION PACKETS INS NEBRASKA WILL PROCESS UNDER THE MILITARY FACILITATED PROGRAM WILL BE THOSE THAT HAVE THE REQUIRED COVER SHEET FROM THE SUBMITTING OFFICE (FOR ARMY, THE PSB/MPD). APPLICATIONS WITHOUT THE REQUIRED COVER SHEET WILL BE PROCESSED UNDER REGULAR PROCEDURES. THE COVER SHEET SHOULD BE ON LETTERHEAD STATIONERY (I.E., THE SAME LETTERHEAD STATIONERY USED FOR OFFICIAL MEMOS) AND CONTAIN THE FOLLOWING INFORMATION:
  - A. THE NAME AND SOCIAL SECURITY NUMBER (SSN) OF THE APPLICANT SOLDIER.
  - B. WHERE THE SOLDIER PHYSICALLY IS AT THE TIME OF MAILING THE APPLICATION.
  - C. THE SOLDIER'S PREFERRED INS LOCATION FOR THE INTERVIEW AND NATURALIZATION.
  - D. THE SOLDIER'S PREFERRED DATE RANGE FOR THE INTERVIEW (I.E., MORE THAN SIX MONTHS AFTER THE APPLICATION PACKET IS MAILED).
  - E. DATES OF PROJECTED PCS MOVES, DEPLOYMENTS, PERIODS OF EXTENDED TEMPORARY DUTY (TDY) (I.E., PROJECTED DEPARTURE AND RETURN DATES FOR DEPLOYMENTS AND TDY), ETC., IF ANY.
  - F. A POINT OF CONTACT WITHIN THE UNITED STATES (USUALLY A RELATIVE), IF STATIONED OVERSEAS AND IF FEASIBLE.
  - G. THE SOLDIER'S CURRENT U.S. MAILING ADDRESS (APO/FPO ADDRESSES ARE CONSIDERED TO BE U.S. ADDRESSES).

## **APPENDIX D**

4. THE PRIMARY REASON WHY APPLICATIONS FOR CITIZENSHIP UNDER THE MILITARY FACILITATED PROGRAM HAVE NOT BEEN PROCESSED AS RAPIDLY AS ORIGINALLY EXPECTED IS THAT MORE MILITARY PERSONNEL HAVE APPLIED THAN INS PROJECTED AND STAFFED FOR. INS IS ADDRESSING THIS PROBLEM, AND IMPROVEMENTS ARE NOW IN PROGRESS.

5. EXPERIENCE HAS SHOWN THAT UNEXPECTED PROBLEMS/SITUATIONS SOMETIMES OCCUR AT INS CITIZENSHIP INTERVIEWS. THE MOST COMMONLY OCCURRING EVENT IS THAT A SOLDIER'S CASE IS CONTINUED BECAUSE THE INTERVIEWING OFFICIAL DETERMINES THAT ONE OR MORE ESSENTIAL DOCUMENTS ARE MISSING AND MUST BE PROVIDED TO INS BEFORE THE SOLDIER CAN BE NATURALIZED. SUCH SITUATIONS CAN BE MORE READILY RESOLVED IF THE SOLDIER HAS THE NAME AND PHONE NUMBER OF THE OFFICIAL WHO IDENTIFIED THE DEFICIENCY. THEREFORE, REQUEST THAT YOU ADVISE/COUNSEL YOUR SOLDIER APPLICANTS FOR CITIZENSHIP TO REQUEST AND WRITE DOWN THE NAME AND PHONE NUMBER OF THE INTERVIEWING OFFICIAL WHEN THEY GO TO THEIR CITIZENSHIP INTERVIEWS.

6. INCREASING THE AWARENESS AMONG YOUR NON-CITIZEN SOLDIERS OF THE BENEFITS OF APPLYING FOR CITIZENSHIP THROUGH MILITARY CHANNELS WILL ENHANCE THE EFFECTIVENESS OF THIS PROGRAM. THANK YOU FOR THE HARD WORK YOU ARE DOING TO HELP AMERICA'S ARMY RETAIN VALUABLE, HIGHLY MOTIVATED SOLDIERS. WE WILL CONTINUE TO WORK WITH INS TO REDUCE THE ADMINISTRATIVE WORKLOAD UNDER THIS PROGRAM.

7. POC FOR THIS ACTION IS MR. LORD, DSN 221-4052, COMMERCIAL (703) 325-4052, LORDL@HOFFMAN.ARMY.MIL.

# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

## ***BASIC COURSE DESKBOOK***



### **Part II** **Claims**

The Judge Advocate General's School  
United States Army

MARCH 2002

JA 280

Information for this area not available.



Information for this area not available.

Information for this area not available.

Information for this area not available.

Information for this area not available.

# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

## ***BASIC COURSE DESKBOOK***



### **Part III** **Practical Exercises**

The Judge Advocate General's School  
United States Army

MARCH 2002

JA 280

## **Administrative and Civil Law Department**

### **Practical Exercises**

#### **Introduction**

The primary purpose of Administrative and Civil Law Department instruction is to introduce you, the Basic Course student, to the myriad areas of legal practice that you might encounter in your first few years of active duty. The general intent is to give you an overview of each area and, hopefully, to provide you with the ability to spot the legal issues and to research the answers.

Certain areas of our instruction, however, involve assignments and issues that almost every new judge advocate encounters in his/her first tour of duty. In these areas, we want you to leave the School armed with more than a lecture and an outline.

We have designed several **practical exercises** that focus on specific problems or issues commonly encountered in the field. Each exercise is different in scope and format. Some exercises require you to do research, thus familiarizing you with the particular legal references you will have to use. Exercises during the General Administrative Law instruction require you to prepare a document, familiarizing you with the particular legal documents that we use and giving you a chance to hone your writing skills. Exercises during the Client Services instruction require you to interview a client and participate in a claims seminar, thus familiarizing you with the interpersonal requirements needed to deal with military clients and to process and adjudicate a personnel claim.

These exercises reflect what military attorneys actually do in the field. They take you out of the "sponge" mode and require you to apply some of the information you have absorbed into creating a useful product. After working these exercises, you should be more comfortable about what will be expected of you in your first assignment.

#### **Scheduling**

During the course, you will receive instruction in basic military legal research and military writing, and you will be given short exercises in these areas. In the weeks that follow, you will receive substantive instruction in administrative and civil law topics, and you will be required to do the more complex practical exercises during this time period.

The practical exercises for the Client Services instruction are at Chapters AA through FF of Volume I of the Administrative and Civil Law Department Basic Course Deskbook. Most of the practical exercises for the General Administrative Law instruction are provided to you in Chapters V through X of Volume II of the Administrative and Civil Law Department Basic Course Deskbook. Others may be provided to you under separate cover. Chapter Y of the General Administrative Law Deskbook contains sample legal opinions from installation legal offices that you may use as guides in appropriate cases. There is also an Administrative and Civil Law topic and reference index included at Chapter Z for your use in the field.

Some of the exercises will be done in class, and others will be take-home. Every effort will be made to schedule the take-home exercises so that you will have ample time to work them prior to the turn-in date and time. All of the exercises will include some sort of wrap-up after your solution has been submitted.

An exact schedule of the practical exercises, including the dates and times when the exercise will be introduced and when the solutions are due, will be provided to you as part of an introduction to the Administrative and Civil Law Department.

### **Student Collaboration**

As a general rule, you may not consult your classmates for advice or assistance in completing the exercises. You are solely responsible for identifying the legal issues, researching the answer, and preparing an organized, concise solution using the required formats. Only after the deadline has passed for a particular exercise, and all solutions have been turned in, may you discuss that exercise with your fellow students.

With certain exercises, the professor may authorize students to work together. Do not assume that you can work together unless the professor has specifically authorized it for that exercise. If you have any questions about whether collaboration is authorized for a given practical exercise, ask the professor.

### **Evaluation**

Specific information on how each practical exercise will be evaluated will be provided with each exercise. Certain exercises, however, will have a direct impact on your Academic Evaluation Report (AER), DA Form 1059 (see figure 1). Paragraphs 14a and 14e on this form provide for a specific evaluation (i.e., "Unsat(isfactory)," "Sat(isfactory)," or "Superior") of written communication and research ability. Administrative and Civil Law Department input for these paragraphs will be obtained as follows:

Written Communication	Research Ability
Report of Survey Exercise (1/3 of grade) OER Appeal Exercise (1/3 of grade)	Report of Survey Exercise (1/2 of grade) OER Appeal Exercise (1/2 of grade)

The final 1/3 of the Written Communication grade will be based upon your grade on the SJA Letter Exercise. The Legal Research and Communications Department administers this practical exercise.

The Report of Survey Exercise (Chapter X of the General Administrative Law Deskbook) and the OER Appeal Exercise (Chapter AA of the Client Services Deskbook) will be evaluated using the grading criteria shown on the enclosed critique form (see figure 2), and the following standards:

An **Unsatisfactory** solution is one that contains a major deficiency in one or more of the grading criteria. A **Satisfactory** solution is one that contains no major deficiencies, but contains minor deficiencies in one or more of the grading criteria. A **Superior** solution is one that contains no deficiencies. A deficiency in a particular criteria will be considered "major" if that deficiency occurs numerous times throughout the document; leads the student to a substantive conclusion that is erroneous; or renders the document extremely difficult or impossible to read. Any deficiency that is not "major" is considered "minor."





<b><i>BASIC COURSE PRACTICAL EXERCISE CRITIQUE</i></b>			
<b>STUDENT:</b>	<b>PRACTICAL EXERCISE:</b>		
<b>ADVISOR:</b>	<b>DATE:</b>		
<b>AREA</b>	<b>YES</b>	<b>NO (MINOR)</b>	<b>NO (MAJOR)</b>
<b>I. WRITING.</b> Did the student:			
a. type the solution?			
b. use proper citation?			
c. use proper grammar (i.e., spelling and punctuation)?			
d. express thoughts clearly?			
e. write in an orderly, concise manner?			
f. develop thoughts logically?			
g. differentiate between law, policy, and opinion?			
h. make findings and recommend specific action?			
i. use the proper format(s)?			
<b>II. RESEARCH.</b> Did the student:			
a. find and research all pertinent legal issues?			
b. research all appropriate references?			
c. properly correlate different references?			
d. reasonably interpret references used?			
e. reasonably apply research to the legal issues presented?			
<b>III. OVERALL STUDENT PERFORMANCE.</b>	<b>SUP</b>	<b>SAT</b>	<b>UNSAT</b>
a. Written Communication			
b. Research Ability			

**NOTE:** SUP = satisfied all criteria; SAT = one or more minor deficiencies; UNSAT = one or more major deficiencies.

Figure 2

*Please place any required comments on the reverse.*

Information for this area not available.

Information for this area not available.

## CHAPTER CC

### ESTATE PLANNING DOCUMENT PREPARATION PRACTICAL EXERCISE

***(MATERIALS WILL BE DISTRIBUTED DURING CLASS.)***



Information for this area not available.



Information for this area not available.

Information for this area not available.

## **CHAPTER GG**

### **SEPARATION AGREEMENT PRACTICAL EXERCISE**

*(Materials will be distributed during class.)*

